

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK MENEFEE, B. F. BONNEWELL, H. M.  
TODD and OSCAR A. CAMPBELL,  
*Plaintiffs in Error.*

vs.

THE UNITED STATES OF AMERICA,  
*Defendant in Error.*

## BRIEF OF APPELLANTS

*Plaintiffs in Error*

Writ of Error to the District Court of the United  
States for the District of Oregon.

MARTIN L. PIPES,  
J. J. FITZGERALD,  
JOHN F. LOGAN,  
Attorneys for Plaintiffs in Error.

Filed

APR 21 1916

F. D. Monckton,  
Clerk.



No. \_\_\_\_\_

---

---

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

FRANK MENEFEE, B. F. BONNEWELL, H. M.  
TODD and OSCAR A. CAMPBELL,  
*Plaintiffs in Error.*

VS.

THE UNITED STATES OF AMERICA,  
*Defendant in Error.*

---

## BRIEF OF APPELLANTS

---

Writ of Error to the District Court of the United  
States for the District of Oregon.

---

### STATEMENT OF THE CASE.

The indictment in this case charges the defendants with entering into a conspiracy to violate Section 215 of the Criminal Code of the United States relating to the use of the United States mails to promote fraud. The conspiracy is alleged to have begun on the 1st day of September, 1910, and to have continued until the 1st day of January, 1915. The substance of the indictment, avoiding only its repetitions, alleged that the United States Cashier Company was and is a corporation organized and

existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Portland, Oregon; that between the 1st day of September, 1910, and the 31st day of January, 1914, the defendant Frank Menefee was the duly elected, qualified and acting director and president of the said corporation, and was its general manager between the 28th day of September, 1910, and the 31st day of January, 1914; that the defendant LeMonn, who is not a party to this writ, was the duly elected, qualified and acting sales manager of said corporation between the 1st day of September, 1910, and the 1st day of November, 1912; that the defendant O. E. Gernert was an agent and salesman and acting assistant sales manager of the corporation between the 1st day of January, 1911, and the 1st day of April, 1912; that the defendant Bonnewell was the fiscal agent of the corporation, and an agent and salesman thereof, between the 15th day of April, 1911, and the 31st day of January, 1914; that the defendant Todd was a sales agent between the 15th day of April, 1911, and the 1st day of December, 1913; that the defendant Joseph Hunter was sales agent between the 26th day of May, 1911, and the 31st day of January, 1914; that the defendants Hopson and Muraine, who are not parties to this writ, were respectively sales agents, the first between the 23rd day of November, 1910, and the 1st day of July, 1913, and the latter between the 6th day of March, 1911, and the 31st day of January,

1914; that the defendant Campbell was a director between the 12th day of June, 1911, and the 31st day of January, 1914, and was vice-president between the 30th day of January, 1912, and the 31st day of January, 1914; that the defendant Bilyeu for whom a verdict was directed by the lower court, was a qualified and acting director of said corporation between the 9th day of June, 1913, and the 31st day of January, 1914. That between the 1st day of September, 1910, and the 31st day of January, 1914, the capital stock of the corporation amounted to the sum of \$1,200,000, divided into 120,000 shares of the par value, as fixed in the articles of incorporation, of \$10 a share.

The indictment then charges that the plaintiffs in error, with the other defendants, on or about the 1st of September, 1910, conspired to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote fraud, to-wit: Section 215 of the Criminal Code of the United States, and particularly conspired to devise and execute a scheme and artifice to defraud, to be effected by means of the postoffice establishment of the United States, and to obtain money and property by means of false and fraudulent representations, pretenses and promises, from fifty-five persons named, thereafter in the indictment called Investors, and from the public generally, by inducing them to open communications with the defendants, and with the United States Cashier Company, inducing them,

and the public generally, to purchase from the defendants and said corporation shares of stock of said corporation, and to pay therefor, to the defendants and the company, sums of money and property, the said payment and transfer to be procured by false and fraudulent representations of the defendants to the said Investors and to the public.

It is further charged that it was a part of the said conspiracy that the said scheme and artifice should be carried out by the defendants and effected by them by the further means, methods, manners and plans, to-wit: That they would cause, induce and incite said Investors, and the public, to pay and deliver to the defendants and the corporation, in exchange for the shares of stock, money and property of the value of more than the sum of \$1,000,000, by means of false and fraudulent representations thereafter set forth, and to swindle and cheat the Investors, and other persons to the grand jurors unknown, and the public generally, out of said sums of money and property.

It is further alleged that the said conspiracy was to be effected by means of printed advertisements inserted in newspapers, pamphlets, catalogues, circulars and letters, which were to be transmitted and caused to be transmitted through the United States postoffice establishment to the Investors and other persons, representing and pretending that the said United States Cashier Company owned the patents to a certain change com-



puting machine, a certain bank cashier machine, a certain lightning change maker, a certain currency paying machine, and a certain new style adding machine, and that the said corporation, namely, the United States Cashier Company, was engaged in the business of manufacturing and selling said machines, and each and every and all thereof, and that, on account of said alleged ownership of said patents and the said alleged manufacturing of said machines by said corporation, the said shares of stock in said corporation were of great commercial value and large dividends would be by said corporation declared and paid to the Investors and purchasers, and that the said company would declare and pay to the Investors large and certain dividends upon said stock within six months from the date of the purchase thereof; that the said United States Cashier Company was the owner and in the possession of large *bona fide* orders for the purchase of said machines, and that on account of said orders for the said machines the said corporation would make a large and certain profit; that the financial condition of the said corporation was excellent, and the assets of the corporation far exceeded in value the total amount of the liabilities against and owned by said corporation; that a certain large amount of the capital stock of said corporation, the exact amount being to the grand jurors unknown, offered for sale to the Investors, belonged to and was the property of the corporation, and that the money derived from the sale

thereof would be invested by said corporation in such manner as to increase the assets of said corporation and to make its shares of stock more valuable, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines, and further, that inasmuch as the assets of said corporation were greater than the liabilities, the defendants were justified in raising and increasing the selling price of said shares of stock from the par value of \$10 to \$11, and from \$11 to \$12.50, and from \$12.50 to \$15, and from \$15 to \$20, and from \$20 to \$30, and from \$30 to \$50.

The indictment then (page 16, Transcript of Record) proceeds to negative the truth of the representations, in substance as follows: That in truth and in fact, and as the defendants well knew, during the dates mentioned, neither the said corporation nor any of the defendants owned the patents to said certain change computing machine, or to said lightning change maker, or to said certain currency paying machine, or to said certain new style adding machine.

It will be noticed here that one of the errors relates to this omission, that the indictment does not negative the representation that the said company owned the bank cashier machine.

The indictment then proceeds in its negation, and alleges that in truth and in fact, and as the defendants well knew, at the dates specified in the indictment the United States Cashier Company was



not engaged in either the business of manufacturing or selling said machines, or any thereof, but on the contrary its business was to sell and dispose of the said shares of stock; and further, that in truth and in fact, and as the defendants well knew, on the dates specified the said shares of stock were of little value, and of practically no value whatsoever, and were practically worthless, and that in truth and in fact, which the defendants well knew, no dividends whatsoever would ever be by said corporation paid to the Investors, or to any person who should purchase the said shares, and that none of the Investors or purchasers of the said stock would receive any dividends whatsoever; and that the said company was neither the owner nor in the possession of the said alleged *bona fide* orders for the purchase of said shares, and that the said financial condition of the said corporation was not excellent, but that it was at all of said times absolutely insolvent, and that the value of the assets of the corporation amounted to a sum much less than the total amount of the liabilities against and owed by said corporation, and that a large amount of the shares of the corporation represented to be the property of the corporation consisted of shares of stock owned by the defendants, and that all of the sums of money received on account of the sales thereof would be appropriated by the defendants, and none of the same would be paid into the treasury of the corporation, and that none of the defendants were, at any time, on account of the financial condition

of said corporation, justified in raising the selling price of the said shares of stock, and that in truth and in fact, and as the defendants well knew, that at all the dates mentioned in the indictment every person who would purchase the shares of stock from the defendants, or from the corporation, would suffer a loss on account of the said transaction of all the sums of money paid therefor.

Then the indictment proceeds to say that it was a further part of the said conspiracy that the scheme and artifice was to be carried out by the further means and plans that the defendants would from time to time, during the existence of the conspiracy, fraudulently publish untrue written and printed statements of the assets of the corporation and of the liabilities, and of the financial condition thereof, and that said statements of the said assets would be sums greatly in excess of the true value of the assets of the corporation, and that from said statements there would be omitted from the liabilities owed by said corporation a sum amounting to more than half a million dollars.

That it was a further part of said conspiracy that the said artifice and scheme should be carried out by selling the shares of stock to investors in the States of Oregon, Washington, California, Idaho, Montana, Wyoming, Utah, Texas, Iowa, North Dakota, Michigan, Illinois, Colorado, New York, and other places to the grand jurors unknown.

It was further charged to be a part of said conspiracy that the defendants would so manage and

control the business affairs of said corporation that more than twenty-five per cent of all the sums of money received from the investors and paid over to the corporation for the said stock would be appropriated by the defendants to their own use and gain.

It was further charged to be a part of the said conspiracy that the scheme and artifice should be carried out by the further means that the defendants would increase the selling price of the said shares of stock from \$10 to \$11, and from \$11 to \$12.50, and from \$12.50 to \$15, and from \$15 to \$20, and from \$20 to \$30, and from \$30 to \$50, each.

It was charged that it was a part of the said conspiracy to execute the said scheme and artifice, and to attempt so to do, by placing in the postoffice of the United States at Portland, Oregon, the said newspapers, pamphlets, catalogues, circulars and letters, which would request the Investors to pay the defendants money for said stock, all of the said documents to be delivered by the postoffice establishment to the persons to whom they were addressed, in pursuance of the conspiracy.

It is then charged that the conspiracy was to continue from the 1st day of September, 1910, until the 1st day of January, 1915, and that it was a continuing conspiracy, and that the defendants would continue to be parties to said conspiracy and continue to commit the acts thereinbefore set forth in detail, and it is then alleged that the conspiracy in fact continued to the 1st day of January, 1915, and was in operation during that time.

It is then alleged that in pursuance of the conspiracy, and to effect the object thereof, several of the defendants committed the overt acts by depositing letters in the postoffice at Portland, Oregon, which are set out in the indictment, and which are omitted from the statement because they do not enter into the questions under the assignments of error. Only one of these letters, that dated the 7th of June, 1912, and sent by the defendant Menefee, and constituting the third overt act, found on pages 35 to 43, of the Transcript of Record, will be hereafter briefly referred to, but is omitted here in order to avoid unnecessary prolixity.

The bill of exceptions shows, following the language of the indictment, that the Government offered evidence tending to prove all these allegations. The detail of that evidence is not stated in the bill of exceptions except that a great many letters and documents introduced as exhibits in the case have been referred to in the bill of exceptions, and it is stipulated between the learned district attorney and the defendant's counsel that all of these exhibits may be deemed a part of the record and referred to in the same manner as if they had been printed in the record. So far as the case of the plaintiffs in error is concerned, it is not deemed necessary or helpful to consider these exhibits, or any other part of the record than the evidence recited in the bill of exceptions, in order to determine the validity of their assignments of error.



The Government identified and offered in evidence, which were received, copies of six patents and twelve applications pending. All but four of these became the property of the United States Cashier Company, and those four were assigned to the International Money Machine Company. (Page 192, Transcript of Record.) The connection of the International Money Machine Company is shown by evidence recited on page 230, of the Transcript of Record. It shows that about January, 1914, the defendant Menefee and the other officers and directors of the United States Cashier Company, finding that the manufacture of the machines at Portland, where a factory had been established and had been in operation, was not satisfactory and economical, and that it lacked capital, caused to be organized and incorporated the International Money Machine Company at Terre Haute, Indiana, and had procured additional subscriptions to the capital stock of that corporation; that an arrangement had been made by which the United States Cashier Company transferred to the International Money Machine Company substantially all of its assets in Oregon, and had effected a contract with the International Company and promoters by which the United States Cashier Company received something more than fifty per cent of the paid up stock in the International Company, and that the design and purpose of the defendants and officers of the United States Cashier Company was to continue the manufacture of the machines which they had commenced



to manufacture, and to conduct the business in Terre Haute, Indiana, and that that company had proceeded, and at the time of the trial was proceeding to manufacture and sell one of the machines involved and for which an application for a patent was pending to the International Money Machine Company. One of the machines recently manufactured by the Indiana Company was used in evidence and demonstrated in the presence of the jury to show its workings.

There was evidence tending to show that the assignments made of the applications and patents by the several persons named in the testimony had been made by the applicants, or by the Cashier Company, to the International Money Machine Company as a part of the assets of the Cashier Company under the arrangement and contract hereinbefore referred to.

At the time of the publication of the advertisements claiming that the United States Cashier Company owned the patents, it owned only the Potter patent. The other patents obtained by the Cashier Company, or transferred directly to the International Company, in pursuance of the said arrangement, were issued afterwards, and a number of applications for patents for the different machines were filed and were pending in the department at Washington, some of the claims having been allowed and some rejected.

The questions involved in this writ are more particularly elaborated in the assignments of error

printed below and in the argument upon the law and the facts. For the purpose of the present statement the points may be explained as follows:

The indictment charged that the defendants falsely and fraudulently represented that the company owned the patents to five machines, designated in the indictment as the change computing machine, the bank cashier, the lightning change maker, currency paying machine and a new style adding machine. The evidence showed that these representations were made in advertisements in the Portland Oregonian, Portland Journal and Postland Evening Telegram, newspapers published in Portland and having a wide circulation, and the advertisements were contained in the months of October and November, and perhaps one in December, 1911, and stated that the defendants owned and controlled the patents to the said five machines. The indictment negatived the said ownership as to all of the machines except the bank cashier machine, which it did not negative. The evidence showed that the defendant Menefee wrote a letter, the substance of which was sent out to the public, reciting the patent situation as of its date. The date was June 7, 1912, and the letter was written to Dr. A. A. Milliken, of Fort Jones, California. This letter is the third of the overt acts charged in the indictment, and is found on pages 36 to 43, Transcript of Record. So far as we know the truth of this letter is not disputed as a true statement of the patent situation as of its date.

One question at issue was whether or not the representation as to the ownership of the patents was not only untrue but was fraudulent and made for the fraudulent purpose of selling the stock. The Government itself offered the copies of the patents and applications procured by the defendants thereafter, and the defendants had a right to refer to their conduct in seeking to secure patents as bearing upon that question. In that situation the Government offered Mr. Oviatt as a witness. As his evidence will have to be more particularly referred to hereafter, it is sufficient here to say that its tendency was to show that Mr. Oviatt, in 1909, had an arrangement with Thomas Bilyeu to invent a coin-paying machine, and that according to Mr. Oviatt's testimony Mr. Bilyeu had refused to carry out the arrangement, whereupon Mr. Oviatt invented a machine called the Payograph, and the testimony of Mr. Oviatt had the purpose and effect of indicating that the Payograph machine was in such conflict with the machine of the defendants secured from Bilyeu as to affect the value of the stock of the company. The Payograph had not been patented. The point involved is upon admitting the testimony of Oviatt over the objection and exception of the defendants upon the question of the good faith of the defendants.

Another point involved is as follows: The Government was permitted to prove that the patent for the bank cashier, which had not been negatived in the indictment, had not been issued, although appli-

cation was pending for it. That was received by the court over the objection and exception of the defendants, and the defendants claim that that was error, because it allowed the Government to prove a fact, the truth of which the indictment had not negatived.

Another point involved arises upon the testimony of E. D. Sewell. He was an expert upon patents from the Patent Office at Washington, and was fully qualified to testify, and he testified fully concerning the patents and applications. In a number of cases he was allowed to show that in the process of applying for the patents by the defendants, and their assignors, the Patent Office had made a reference, which was the customary practice, to prior patents issued that might interfere or be infringed by the patents pending. This witness showed that the practice of the department in passing upon the question of the patentability of a claim was to cite the applicant to prior inventions patented, and such proceedings are then had as that, if the Patent Office considers that the claim applied for would be an infringement of a prior patent, the claim would be rejected, otherwise it would be allowed. A great number of references to prior patents in respect of the applications made and of the patents actually issued were allowed to be testified to by the witness and appeared in the copies of the patents and applications in evidence. All of this testimony was objected to on the ground that when a claim had been allowed or a patent issued, the fact



that prior patents had been referred to would not be competent in the case at bar against the defendants. The court admitted that evidence upon the question of the good or bad faith of the defendants in this case. The particulars of this testimony appear hereafter.

Another point involved arises as follows: One of the allegations of the indictment, and the central and fundamental one (bottom of page 16 and top of page 17, Transcript of Record), is as follows:

“Whereas, in truth and in fact, and as the defendants and each and every and all thereof, at and during and between all of the times and dates mentioned, specified and stated in this indictment, then and there well knew, the said corporation, namely, the United States Cashier Company, was not engaged in either the business of manufacturing or selling said machines, or any thereof, but on the contrary its business was to sell and dispose of the said shares of stock.”

That was a negative of the allegation made prior thereto in the indictment (page 13 and 14, Transcript of Record) as follows:

“That the defendants represented that the United States Cashier Company was engaged in the business of manufacturing and selling said machines, and each and every and all thereof, and that on account of the said alleged ownership of said patents and the said alleged manufacturing of said machines by said corporation, the said shares of stock were of great commercial value, and that large dividends



would be by said corporation declared and paid to the investors."

At divers places in the indictment the promises and assurances of the defendants were set out indicating representations of great value of the stock to the proposed stockholders. The court, however, instructed the jury in effect and substance that the defendants could be convicted even though they honestly believed, at the time the said representations were made, that the stock would be valuable and produce a profit to the investors. The instructions referred to constitute assignments XVII, XVIII and XIX of the assignments of error hereinafter set forth. The giving of the said instructions was duly excepted to.

The specifications of error, together with the substance of the testimony and of the instructions referred to, are as follows:

#### ASSIGNMENTS OF ERROR.

*In the District Court of the United States for the  
District of Oregon.*

United States of America,

vs.

Frank Menefee, B. F. Bonnewell, H. M.

Todd and Oscar A. Campbell,

Defendants.

ASSIGNMENTS OF ERROR OF DEFENDANTS FRANK  
MENEFEE, B. F. BONNEWELL, H. M. TODD  
and OSCAR CAMPBELL.

The defendants Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, in this action, in connection with their petition for a writ of error, make the following assignments of error, which they aver occurred upon the trial of the cause, to-wit:

I.

The court erred in admitting testimony, over the objection of the defendants, contained in objection and exception "A," in the bill of exceptions, which is the testimony of N. C. Oviatt, who testified that his name was Nelson C. Oviatt; that he lived at Detroit, Michigan, and was engaged in the manufacture of coin-paying machines, called the Payograph, was president of the Payograph Company, which was a corporation organized under the laws of Michigan, incorporated for \$300,000, with a principal office in Detroit, and having machines manufactured for it in New Haven, Connecticut; that he was acquainted with the defendant Thomas Bilyeu, and met him first in the summer of 1909 in the Ainsworth Block, Portland, Oregon; that the witness had been in Portland since 1892, first in the manufacture of silver spoons, later as an employe of the County of Multnomah, in the tax collection department, and later as coast agent for the Compograph Company of Chicago, in the sale of adding

machines, and also represented the Brandt Cashier Company in the sale of Brandt Automatic Cashiers; that he had devised the principle of a coin-paying machine and had gone to Mr. Glover, a public engineer with a view of having him develop it for the witness, but he was unable to do so, and that he presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results and that the witness was to have the other sixty per cent of the results; that the agreement was not in writing; that the witness was to turn over to Bilyeu his ideas and Bilyeu was to proceed with the development and put it into working shape and build a model.

Which evidence was stated at the time by the district attorney, in response to an objection made by the defendants' counsel, to be for the purpose of showing that back in 1909 the witness, Mr. Oviatt, was working on a coin-paying machine, and that he had made a full and complete disclosure to the defendant Bilyeu, and that the Government was going then to proceed to follow the making of the machine known as the Payograph, and the knowledge of the Payograph as it was brought home to the defendants, the attempted sale of a similar machine by the defendants in England, and their knowledge of the Payograph applications pending there, and conversations had between defendants Bilyeu and Menefee and LeMonn with this witness;

bring these transactions down to the date where LeMonn made an investigation of the Payograph machines personally and sent the telegram that had been introduced in evidence. And, in response to an inquiry by defendants' counsel, the district attorney said that the evidence would go to the extent of showing the knowledge of the defendants of the work that Mr. Oviatt was doing.

This evidence was admitted over the said objection upon the question of the good faith of the defendants.

## II.

The court erred in admitting the following testimony:

The witness continued, under the said ruling of the court, for the purpose as aforesaid, and testified that he disclosed to Mr. Bilyeu the basic principle, which was the connection of each individual key with a selector bar or rod so that by a depression of that key the proper ejector or ejectors would be turned from a non-paying to a paying position; that Mr. Bilyeu said he would undertake the work, with the understanding that the results would be divided, sixty per cent to the witness and forty per cent to Bilyeu, and that was agreeable to witness, and that they shook hands on it. That Mr. Bilyeu said to him, "I will take you out to my model maker," which he did, in South Portland, to Mr. Overlin; that he had not seen Mr. Overlin before, and that Mr. Bilyeu introduced him to Mr. Overlin, and said that the witness had been associated with

Mr. Potter in the development of the machine and had not been treated fairly by Mr. Potter, that witness had devised a machine of his own and arranged with Bilyeu to develop it and wanted Overlin to undertake the manufacture of the model; that Mr. Overlin accepted, and they returned to town; that Mr. Bilyeu advertised for a draftsman and put him to work in the Ainsworth Block; that a model was constructed; that a month or six weeks after that time Mr. Bilyeu said to the witness one day that he had been thinking the matter over for a week past, and had decided that the witness did not own anything in the device, and went on to say that he had applied for a patent in his own name, and the witness said there was nothing further to do except for witness to make a better machine, and that Mr. Bilyeu said he could not do it. That he went East the 2nd day of May, 1910, and went first to the Comptograph Company with sketches, and then to the Wales people, and finally arranged for the building of the machine, and completed it in August, 1910, and that was the Payograph machine; that he applied for a patent on the machine in August, 1911; that the first model was made in August, 1910, and that the second model was completed in 1912.

The witness was then shown three photographs, which were identified as photographs taken in August, 1910, of a machine he had just completed and demonstrated to the executive board of the Wales Adding Machine Company, and the Govern-



ment then offered the said three photographs in evidence, which were admitted over the defendants' objection and exception, which is exception "B," of the bill of exceptions.

### III.

The court erred in admitting the following testimony:

The witness then continued, subject to the same ruling of the court, to testify that he returned to Portland the latter part of August, 1910; that he knew of a certain machine of the United States Cashier Company, known as the Bank Cashier, had heard of it and seen it, but never examined it closely; that he thought the machine was one that was covered by the application over the names of Bullington, White and Overlin; that in the year 1910 he met Mr. Bullington, and that he exhibited the three photographs in evidence to Mr. Bullington in August, 1910; that he met the defendant F. M. LeMonn in the office of the Payograph Company in Detroit in January, 1912, and that LeMonn told him that he had been at the office of the National Cash Register Company and had there been told of the Payograph; that LeMonn had a little booklet descriptive of the Payograph, which he said had been given to him by the paymaster. Witness identified a book which he said was exactly like the one LeMonn showed him; that it was issued by the Payograph Company, and that it was the one Le Monn brought to him at the time, one exactly like

it and of the same issue, and that LeMonn said he had received it from the National Cash Register Company. The said booklet, over defendants' objection, was admitted in evidence, which is exception "C," and which book is as follows:

The witness continued and testified that the defendant LeMonn said that he had been told of the Payograph by the paymaster, Mr. Myer, and wished to see it, and after questioning by the witness said that he had been with the United States Cashier Company but was not with them at the time; had got through selling stock and was east looking for other things to finance, and asked the witness if he did not want him to take hold of the Payograph and finance it, which the witness said he did not. The witness said he demonstrated the Payograph to LeMonn; that Mr. LeMonn expressed himself as pleased with it, went on east and left his address, with the request that the witness think over the matter of financing the proposition and communicate with him if they decided to take him on to do the work; that the machine he demonstrated to LeMonn was the one described in the little booklet; that there was no model of it. The witness further said he took half an hour to demonstrate the machine; that the machine would pay money, list it and add it; that he did not take the case off the machine, the mechanical part of it.

The witness, further testifying, said that he met Mr. Menefee in October, 1913; that Mr. Menefee came to his office in October, 1913, and told

him that he was the president of the United States Cashier Company, and asked what they were going to do with the British patents, or if the witness had sold them, and he said he had not; that Menefee asked what they were going to do with them, and he said he had no other plans than to retain them; that Mr. Menefee then told him they were arranging for a syndicate in Britain to take over their British rights, and that he felt upon investigation by the people there they might run upon the application and it might possibly interfere with the deal, and that he thought for the good of both it might be well to make some arrangement whereby the patent of the Cashier Company in Great Britain would be included with the patent of the Oviatt machine; that Menefee described to him the deal, that it was to be a million dollar corporation, of which \$200,000 stock was to be paid to the United States Cashier Company, and \$50,000 in cash, which was to be divided between Mr. Bilyeu and the United States Cashier Company, and that if the witness would come into the deal it would be split in thirds. That Menefee wanted him to combine their entire interests in one large corporation. The witness said he took the matter under consideration, and afterwards, in about two weeks, told Menefee he would not entertain the deal.

The witness further testified that subsequent to this conversation, and at the request of defendants Bilyeu and Menefee, he had met said defendants in Chicago, and that they had attempted to get the

witness to go in with them upon a proposition by the terms of which the Payograph was to be included in the deal that the defendants had pending in England, and the two said defendants represented to witness that on account of the conflict in Great Britain between the machine of the United States Cashier Company the deal could not be closed without the co-operation of the witness. The witness further testified that he refused to consider said proposition. The witness further testified that the Payograph machine had been patented in the London patent office, and that the Payograph Company owned it.

Witness was asked to demonstrate the Payograph machine, a model of which was in the court room, which he did, and said that the adding machine was not his invention, but that the coin-paying device was his invention, and was connected with the adding machine so that when the key was depressed and the handle of the adding machine operated, the money is ejected into the hand or an envelope, and fully explained the working of his machine. He testified that his machine was so constructed that the adding machine could be used with or without the coin-paying mechanism, that they were detachable.

And thereafter, and in the course of the trial, Mr. Dobson, of counsel for Mr. LeMonn, asked the district attorney to have the Oviatt machine brought back into court, after Mr. Oviatt had been excused, and the next morning, at the opening of court, Mr.

Reames offered the said machine, stating that he did not claim the right to have it demonstrated, that the machine was to be shipped east, but that it was at the disposal of the defendants. Whereupon the counsel for these defendants stated to the court that they did not desire to have the machine demonstrated and that the machine could be sent east as far as they were concerned, but one of the jurors requested that the machine be demonstrated, and thereupon the witness proceeded to demonstrate the machine by actually operating it by putting money into it and by manipulating it, having the money paid out in envelopes according to the design and purpose, the said demonstration being made in the presence of the jury.

#### IV.

The court erred in admitting the testimony of E. D. Sewell, over the objection of the defendants, which is exception "D."

Mr. Sewell had testified that he lived at Washington, D. C., and had been employed in the United States Patent Office, for nine years in the examining corps, nine years and a half as assistant examiner, and about the same period as principal examiner, and for the remainder as an examiner of classification, and had detailed at length his duties, tending to show his qualifications as an expert in relation to patents, and the procedure in the patent office. He further testified that he had made an examination of the records of the patent



office to ascertain the patents and applications owned and standing in the name of, upon the records of the United States Patent Office, the United States Cashier Company; that his examination extended from January 1, 1909, to December 31, 1914, and he testified that the United States Cashier Company did not own a patent to an adding machine, nor did it, at the time of the examination of the witness, and did not have an application on file for an adding machine on October 29, 1911; nor did it have an application on file at that date for the Lightning Change Maker described; that a patent for the Lightning Change Maker was issued July 6, 1915, and the number of the patent was 1,145,700. That there was no application for the Change Computing Machine by the United States Cashier Company on October 29, 1911, and that the United States Cashier Company did not own any patent for any machine designed to do that work; that the United States Cashier Company did not own any patents to any machine which was designed to compute change for department stores and all classes of retail business, as described in the advertisement; that on the 29th day of October, 1911, the United States Cashier Company had no application on file for any machine that would do that work, and that from the 1st day of January, 1909, until the 31st day of December, 1914, the United States Cashier Company never did own patents to any of the machines described in the advertisement about which he had been asked.

And the witness testified that the patent which was issued on the 6th day of July, 1915, about which he had testified, was assigned to the International Money Machine Company, and witness presumed it was issued to them; that it had been assigned by the United States Cashier Company; that the patent was based on application made by W. S. Overlin; that except for the assignment it would have been issued to the Cashier Company, and the district attorney admitted that it was by virtue of the assignment of the United States Cashier Company that the International Company got the patent.

The witness had stated a list of all the applications that had been filed, either on behalf of the United States Cashier Company, or assigned to the United States Cashier Company, and all patents that had been either issued to the United States Cashier Company, or issued to anyone else and assigned to the United States Cashier Company, from the year 1908 to December 31, 1914. These patents were as follows: The first patent was the Potter patent, issued April 28, 1908, and assigned by mesne assignments to the United States Cashier Company, recorded April 12, 1912. A certified copy of the letters patent was received in evidence, exhibit 343. The witness then described the objects of the invention.

The next patent was issued to Thomas Bilyeu, December 31, 1912, and was a design for the casing for coin-handling machines. And witness testi-

fied that there were other applications and other patents that were issued to others, like Thomas Bilyeu, and assigned direct to the International Money Machine Company; that there were eighteen applications and patents together that were either issued to Mr. Bilyeu or to Mr. Overlin and assigned, or other persons in the United States Cashier Company, and assigned to the International Company: that of these eighteen applications there had been six patents issued and the other twelve applications were pending; that there were four where title never went through the United States Cashier Company, but assignment was made to the International Money Machine Company. One of these patents was dated October 20, 1914; another was issued February 28, 1911, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company; another was application by Thomas Bilyeu, filed April 14, 1910, assigned to the International Money Machine Company; another was application filed March 27, 1911, by Bilyeu and Overlin, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company, and the latter had been allowed by the examiner but not yet patented. Another was application filed September 24, 1909, which was forfeited, and was afterwards passed to issue and patented September 14, 1914, to Thomas Bilyeu.

The witness was then asked the following question: "Now, you have said in your examination yesterday that when an application is filed in the

patent office, and the examiner has made his search and finds something in conflict, or apparently in conflict, that those claims are cited and notice given to the applicant that certain claims are cited against him. Now, can you give to the jury the number of the prior patents that were cited against this Bilyeu Cashier?"

The witness answered: "Yes, I have a note of that. Fifteen patents cited during the prosecution of this application."

And the witness testified that one of the citations was a patent issued to a man by the name of Lindeloff, Patent No. 619,321, dated February 14, 1899.

Whereupon the district attorney asked the witness the following question: "Are you able to say from the examination, as an expert in the science of patent law, whether or not the Lindeloff patent dominates the Bilyeu Cashier?"

To which question the defendants' counsel objected, on the following grounds: "We object to going into it to show whether or not some prior patent they did cite, upon which the department has issued a patent, if anything conflicts with that. If it were so, it wouldn't have anything to do with this case, and then the court and this jury can't try that out here, it seems to me. This is something that took place in the patent office. These defendants made their application."

The counsel for the defendants asked the witness this question: "The department cites this

previous machine, doesn't it?" And the witness answered: "Yes."

After argument of counsel, the court ruled upon the objection as follows: "The controlling question in this case is one of good faith, and the Government charges that these people were not engaged in a legitimate enterprise, but were using it for the purpose of defrauding the public. Now then, if they had these patents, or pretended to have them, knowing at the time that they were not what they were representing them to be, and based upon that, insisted and represented that their stock was of a certain value, and was increasing in value all the time, and that they proposed to go ahead and manufacture these machines, it would come within the terms of this indictment, and would be a question that I think the jury have a right to consider, in determining whether they were acting in good faith in this transaction. If they were, then of course that is the end of the case. If not, and they come within the provisions of the indictment, and sustained by the testimony, they would be guilty of the charge against them. Therefore, I think the Government has the right to show that, notwithstanding these people had patents, if they knew at the time that their patents were invalid, and would not permit them to manufacture these machines, it is a circumstance going to determine whether they were acting in good faith, or not. It does not go to the validity of the patents. We are not trying that question. It goes to the good faith of the defend-



ants, and for that reason I think the testimony is competent.”

And so the court overruled the objection and permitted the witness to answer, in which ruling the court erred.

## V.

The court erred in admitting the following testimony:

Under the said ruling of the court the witness testified that the Lindeloff patent was issued February 14, 1899, which was cited against the Bilyeu patent, and the witness said he had read the claim of the Lindeloff patent in connection with the machine shown and described in the Bilyeu patent, No. 1,114,574, and in his judgment the construction shown and described was within Claims 1 and 2 of the Lindeloff patent.

And the district attorney asked the following question: “What would you say as a patent expert as to whether or not the claims numbered 1 and 2 of the Lindeloff as allowed, dominate and control these claims in the Bilyeu Cashier?”

And the witness answered: “These claims as allowed dominate the construction shown in the Bilyeu Cashier.”

And in like manner the witness testified about Patent No. 885,136, patented February 28, 1911, to Thomas Bilyeu and W. S. Overlin, and assigned direct to the International Money Machine Company. That the purpose of this machine was the

same as that of the patent to Bilyeu hereinbefore last recited, No. 1,114,574, and the witness testified that the Lindeloff patent was cited against that application, and that as an expert in his judgment the claims of the Lindeloff patent dominated this patent in the same way that they did the patent previously spoken of, the original patent.

And the witness was permitted further to testify, in substance, in response to questions by counsel for defendants, that the witness referred to the patent in speaking about citing; that they generally made a positive rejection in view of that as meeting it, as anticipating the claims; they reject the claim to which that patent applies; that in the prosecution of an application through the patent office the solicitor and examiner give information back and forth until they finally get exactly what is thought to be patentable by the patent office; that the patent office delivers a written opinion to the applicant, that he is not entitled to a patent because there has been another patent prior to that already issued, but that when they do not reject it, but issue a patent they do not tell him that, they simply cite the art, cite the patent; that the department did not express any opinion regarding the infringement, and that the witness did not express any opinion when that particular patent was issued, not as dominating, simply anticipating.

And thereupon, in view of the evidence, counsel for defendants moved to have the evidence stricken out.

And being further examined by the district attorney, the witness testified that a letter of rejection is written in which the patent is identified and the applicant is told that his claim is rejected in view of that patent, in anticipation, but that when it was not rejected, if it was not to be rejected on that patent, that patent would not be cited except in a friendly way perhaps, to show what the prior art was.

And in response to questions by the defendants' counsel, the witness stated that he believed in his judgment claims 1 and 2 of the Lindeloff cover the construction disclosed by the Bilyeu machine; that that was witness' opinion after examination; that nobody in the patent office gave an opinion to Mr. Bilyeu about the dominating control referred to.

Whereupon counsel for the defendants said: "I think I am entitled to have that out, for it didn't go to Mr. Bilyeu."

The court then said: "I understand they notified him of this prior patent."

Counsel for defendants: "They didn't notify him of the witness' opinion as an expert, because it was not their duty to give him that information."

The Court: "That is clear, but they did notify him of the patent, of the prior patent."

Counsel for defendants: "Yes, they cited the patent."

The Court: "And advised him of that, so he knew there was such a patent, and he took his own chances with reference to disposition."

Counsel for defendants: "I suppose, for his information about that, but he didn't have the benefit of this witness' opinion that the jury has."

The Court: "No, goes to the question of his good faith."

And the court overruled the motion to strike out the testimony, and in so ruling committed error, which is exception "E;" and the witness testified that there were thirteen patents cited in the Bilyeu patent, issued prior to that time, including the Lindeloff.

## VI.

The court erred in admitting the following testimony:

The witness testified further about Application 555,552, filed April 14, 1910, by Bilyeu, Overlin and Gridley, and still pending; that the assignment was made to the International Money Machine Company; that it was an invention to cover another machine of the Bilyeu Cashier type. After describing the invention, witness testified that there were ten patents cited against that.

Witness further, under the ruling of the court, testified about Patent No. 617,201, which was forfeited and renewed under Serial No. 30,673, and was allowed on June 1, 1915, but had not yet been patented. An assignment of this case was made to the International Money Machine Company by the applicants, none to the United States Cashier Company. The purpose of this invention was to print

a record of the amount of money delivered by the machine, and, after describing the machine, the witness testified that there were eleven patents cited against this patent.

The witness then testified about Application No. 638,434, filed by W. S. Overlin, assigned to the United States Cashier Company, and by mense assignments to the International Money Machine Company. The filing was November 3, 1911. This was a machine for delivering paper currency. After describing the machine, the witness testified that there were nine patents cited against this patent. One was a patent that had been issued to a man by the name of Cook. The Cook patent was No. 807,724, dated December 19, 1905, and in the witness' judgment claim 63 of the Cook patent includes the drum structure disclosed in this application, and dominates it.

The witness then testified about Application No. 702,164, filed June 7, 1912, the Bank Cashier.

At this point it was admitted that the negative in the indictment as to the ownership of the patents by the company did not include the bank cashier, that it had been left out of the indictment inadvertently.

Thereupon the counsel for the defendants objected to evidence concerning the Bank Cashier, on the grounds stated in the following statement to the court: "Now, that brings up a question, a good, clean-cut question for Your Honor to decide, whether or not it is sufficient in an indictment,



any more than it is in a suit in equity, to charge a representaton as being false. If I understand the rule of pleadings applicable to civil as well as criminal cases, when you allege a false and fraudulent representation, you haven't gone far enough by applying to it that epitaph of fraud vitpuerative. What you have to do, as I understand, in a civil or criminal case, when you are depending upon false representations, is to state in what particular it is false; a false representation may not be fraudulent, and the mere designation of it by that adjective is not sufficient."

Whereupon, after argument of the district attorney, the court ruled as follows: "I think there is a reason why this testimony is competent, and that is, it has been shown in evidence that this company advertised at a certain time that they had patents to these certain named machines, they owned the patents to certain named machines. The evidence up to this time shows that they didn't have patents to some of these machines they were then advertising. Now, that was either an intentional misstatement, or it was an error of judgment and misinformation, and that becomes an important question, I suppose; it will be before this trial is through, for some triers of fact to determine in arriving at that question. I think the Government is entitled, in a case of this kind, where it depends on circumstances, to put in evidence other acts of a similar kind, transactions of a similar kind that happened at the same time. And when they ad-

vertised these machines the Government alleges they didn't have, they advertised another machine they didn't have at the same time, and it is for the Government to show the purpose and intent for which they advertised the machine, and for that reason I think it is competent. But I don't think for the purpose of showing that was one of the means by which the defendants intended to carry out that conspiracy. I think the Government is required in an indictment of this kind to negative those allegations, but it simply goes to the intent or purpose of the defendants."

And counsel for the defendants, further stating his objection, said: "I will have the record show that, the part of it I am sure about is that the indictment, in effect and legal substance, alleges by admitting that that machine was patented, and that no issue is raised between the indictment and the plea of not guilty on that question."

And the court overruled the defendants' objection, to which an exception was taken, which is exception "F."

## VII.

The court erred in admitting the following testimony:

The witness, under said ruling, further testified about Application No. 702,164, filed by Nelson White, W. S. Overlin and F. A. Bullington, filed June 7, 1912. The title of the invention was a Mechanical Cashier, Adding and Listing Machine. The patent had not yet been granted. This was

assigned to the United States Cashier Company, and afterwards to the International Money Machine Company by the Cashier Company. The machine comprised an adding machine with printing attachment to print the amount separately and to take totals. After describing the machine, the witness testified that there were twenty-four American patents, and two German and two English patents cited by the examiner against that machine, and that that patent had been placed in interference by Nelson C. Oviatt, on September 29, 1914. There had been one hundred and forty-seven claims made in the application, and of these claims three were made counts in the issue of interference, and disregarding these leaves one hundred and forty-four, of which twenty have been allowed and one hundred and twenty-four rejected.

The witness then testified about Application 710,512, filed by W. S. Overlin, for Money Paying, Changing and Listing Machine, filed July 19, 1912. This was the machine called the Computing Machine, and the same machine that had been identified by the witness Overlin upon the stand as the Computing Machine which he had built. No patent had been granted. This had been assigned by Overlin to the United States Cashier Company, and by the Cashier Company to the International Money Machine Company. The purpose of the invention was to deliver coins of a value equal to the difference between an amount tendered and an amount to be deducted from it. After describing the ma-

chine, the witness testified that there were twenty-one United States patents cited against that machine, and three English patents and two German patents. That there were two patents to a man named Osborne cited against the patent, Osborne patent No. 864,185, dated August 27, 1907, and Osborne patent No. 982,853, dated January 31, 1911. The witness said he had examined the Osborne patent carefully; that it had been issued to the National Cash Register Company, Dayton, Ohio, as the assignee from Osborne, the inventor. There were one hundred and fifteen claims in the Osborne patent.

Whereupon the district attorney asked the witness the following question: "Now, I wish you would make a comparison and show to the jury, I would like to have you do it carefully and in detail, whether or not this Osborne patent dominates and controls this change computing machine, and if it does so, in what manner it does it, and what claims there are in the Osborne patent that do it."

And the witness then testified, in answer to said question, that he found several which, in his judgment, included the construction of the machine shown here as the computing machine. The witness noted claim 18 of the Osborne patent and read it: "Claim 18. In a change maker, the combination with a movable element, of means for actuating the same, according to the amount of the purchase, means for further actuating the same according to the amount received to bring it to a posi-

tion representing the difference between the two amounts, and a money changer controlled by said movable element." The witness then read claim 47 of the Osborne patent, and claim 100 and claim 101, and then testified that the claims in the Osborne patent were fundamental and basic, and that in the judgment of the witness it would be extremely difficult for anyone to evade that patent, that the only way he could escape it would be to invalidate it. The witness testified that the Osborne patent was pending for sixteen years, and was finally passed upon and patent issued on August 27, 1907, and the life of the patent would be seventeen years from the date of that issue.

All of the foregoing testimony was taken and received over the objection of the defendants that it was not competent on the question of good faith, or for any other purpose, to prove that the patents or applications involved could be affected by citations of a prior patent, and an exception was allowed, which is exception "G."

### VIII.

The court erred in admitting the following testimony:

The witness testified about Application No. 728,853, filed by W. S. Overlin, for money deliveries on street cars, filed complete October 13, 1912, patented July 6, 1915, Patent No. 1,145,700. That machine is known as the Lightning Change Maker. This was assigned by Overlin to the United States



Cashier Company, and by them to the International Money Machine Company. The machine differs primarily from the Bilyeu Cashier in that there is no handle here for operating and discharging. After describing the machine, the witness testified that through his reading of the Lindeloff patent he was led to believe that the first claim of Lindeloff includes the construction of this machine. That this patent was to issue to the International Money Machine Company, and was issued July 6, 1915, in the natural course.

This testimony was taken subject to the same objection and the same exception, which is exception "H."

## IX.

The court erred in admitting the following testimony:

The witness testified about Application No. 729,093, filed by Robert L. Bailey, for a Change Making and Computing Machine, filed November 1, 1912. This was assigned by Bailey to the United States Cashier Company, and by them to the International Money Machine Company. The application was still pending, no patent having been granted. The purpose of the invention was to deliver the difference between an amount tendered and an amount to be deducted therefrom, similar in purpose to that of the Overlin computing machine, which had been theretofore referred to.

The witness was asked the following question: "Now, what have you to say as to your opinion in

regard to this patent being dominated by the Osborne patent, whether or not this is the same as the other computing machine, and to the same degree?"

The witness answered: "The machine shown in this application is within the claims of the Osborne patent which were formerly referred to, and dominated by it."

This evidence was taken over the objection and exception of the defendants, and is exception "I."

### X.

The court erred in admitting the following testimony:

The witness testified that there was a patent, No. 737,958, issued September 1, 1903, to one Pfeifer, which was cited against the Bailey patent, and the witness said that he had examined the Pfeifer patent, and, in response to questions, stated that the Pfeifer patent was issued to Mast, Foss & Company of Springfield, Ohio, and that eighteen claims of that patent, in witness' judgment, included the construction of the Bailey machine as already shown.

This evidence was taken over the defendants' objection and exception, which is exception "J."

### XI.

The court erred in admitting the following testimony:

The witness testified as to Application No. 729,704, for Currency Paying and Computing Machine,

filed by W. S. Overlin, November 5, 1912, for a Mechanical Cashier, that being the official title. This was assigned to the United States Cashier Company, and by the Cashier Company to the International Money Machine Company, and no patent had yet been granted. It was an application for a machine designed to deliver either paper currency or coin, at the wish of the operator, one of those, a paper currency delivery machine, having been referred to hitherto. And after describing one machine, he testified that there were twenty-one patents cited against the application, three of which were German.

This evidence was admitted over the objection and exception of the defendants, which is exception "K."

## XII.

The court erred in admitting the following testimony:

The next application was No. 742,958, which the witness testified was an application by Thomas Bilyeu, filed January 18, 1913, the title being Paper Money Deliveries; that a patent had not yet been granted. This was assigned to United States Cashier Company, and by the Cashier Company to the International Money Machine Company. The purpose of this was to deliver paper money. The witness described the machine, which is similar to the description of a similar machine before given, and he testified that, in his opinion, the application for a currency payer, filed January 18, 1913, by Mr.

Bilyeu, contained rather broad claims that had already been allowed.

This evidence was taken over the objection of the defendants, and the exception, which is exception "L."

### XIII.

The court erred in admitting the following testimony:

The witness testified about Application No. 755,817, filed by Nelson White, March 20, 1913, for Adding and Listing Machine, no patent yet issued. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. This was an improvement in adding machine, and did not, of course, claim to be broadly new because the adding machine art is pretty old and the basic patents have expired. There were twelve claims allowed on this application, and fourteen objected to as not being clear enough to be understood so that the examiner could take definite action upon them, and twenty-two were rejected. There was an amendment filed since that time on the application, but not yet acted on. The amendment was dated May 25, 1915, and its standing at the time of the trial was that it was awaiting action on the part of the patent office. Against this patent the witness testified that there were ten patents cited, one English, one German, and the other United States; that the patents cited were Burrough and Pike.

This evidence was taken over the objection and exception of the defendants, which is exception "M."

#### XIV.

The court erred in admitting the following testimony:

The witness testified concerning Application No. 767,335, filed by Thomas Bilyeu, May 13, 1913, for Paper Currency Paying Machine; no patent yet allowed. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. The purpose of this was to deliver paper currency in a flat condition, and was a further advance in that particular art. The witness testified that the claims allowed in that application were, he considered, broad. There were eight prior patents cited against that application during the consideration of that patent.

This evidence was taken over the same objection and exception, and is exception "N."

#### XV.

The court erred in admitting the following testimony:

The witness testified concerning Application No. 836,771, which was an application filed by Nelson White, May 6, 1914, for Ribbon Feeding Machine. This was assigned to the United States Cashier Company, and by the United States Cashier Company to the International Money Machine Company; that no patent has yet been granted on this



application, the last action having been a rejection, and no amendment yet entered in the files. This was an improved mechanism for feeding and inking ribbon used in adding machines, typewriters, and other machines. The witness described the invention. There were ten claims in the application, of which three specific ones had been allowed, and the other seven rejected, and the witness testified that there were seven prior patents cited against this application.

This evidence was taken over the same objection and exception, which is exception "O."

#### XVI.

The court erred in admitting the following testimony:

The witness testified concerning Application No. 838,065, filed by Nelson White, May 12, 1914, for a Coin Delivery Machine; no patent yet issued on the application. This was assigned to the United States Cashier Company, and by them to the International Money Machine Company. This was a machine designed for the same purpose as the so-called Lightning Change Maker. It was a complete reorganization, different organization. It was broadly to select and discharge coins by the depression of a key. After describing the invention, the witness testified that there had been eleven prior patents cited by the patent office in relation to this application.

This evidence was taken over the same objection and exception, which is Exception "P."

## XVII.

The court erred in giving the following instruction :

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.”

This instruction was given over the objection and exception of defendants, which is Exception “Q.”

## XVIII.

The court erred in giving the following instruction :

“In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent.”

This instruction was given over the objection and exception of defendants, which is Exception “R.”

## XIX.

The court erred in giving the following instruction:

“The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well-known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if

the defendants, by means of the false and fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception."

This instruction was given over the objection and exception of the defendants, which is Exception "S."

#### ARGUMENT.

Assignments I, II and III may be considered together. Bear in mind that the particular issue before the court at the time this evidence was offered and admitted was whether or not the representations made by the defendants of the ownership of the patents was a fraudulent representation. The particular machine in the controversy was the bank cashier described in the indictment, the ownership of the patent to which the indictment did not negative. Nelson C. Oviatt was called as a witness. He was the president of the Payograph Company, which was engaged in the manufacture of the Payograph in New Haven, Connecticut. He said he was acquainted with Thomas Bilyeu in the summer of 1909, at Portland, Oregon; that he devised the principle of a coin-paying machine in 1909, and had gone to Mr. Glover, a public engineer, with a view of having him develop it for the witness, but he was unable to do so, and he

presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results and the witness was to have the other sixty per cent of the results, and the witness was to turn over to Bilyeu his ideas and Bilyeu was to proceed with the development and put it into working shape and build a model. This evidence, besides being recited in the first assignment, is found on pages 170 *et seq.* of the Transcript of Record.

At the end of the testimony just recited counsel for the defendants asked the district attorney: "May I ask what the purpose of this evidence is?" and the district attorney answered to the court and jury: "The purpose of this evidence is to show that back in 1909, witness, Mr. Oviatt, was working upon a coin-paying machine, and that he made a full and complete disclosure to the defendant Bilyeu; and we are going to then proceed to follow the making of the machine known as the Payograph, and the knowledge of the Payograph as it was brought home to the defendants, the attempted sale of a similar machine by the defendants in England, and their knowledge of the Payograph applications pending there; conversations had between Bilyeu and Menefee and LeMonn with this witness; bring these transactions down to the date where LeMonn made an investigation of the Payograph machines personally, and sent the telegram here that has been introduced in evidence."



Thereupon counsel for the defendants asked: "For the purpose of showing that the Bilyeu patent is not good?" To which the district attorney answered: "I don't know whether it will go that far or not, but it will go to the extent of showing the knowledge of the defendants of the work that Mr. Oviatt was doing."

Thereupon counsel for the defendants interposed an objection to said evidence, and as the objection was accompanied with an argument upon the question made to the court, we will at this place recite that argument as it was made to the court, and make it a part of the argument in this brief. The counsel said (Transcript, pp. 171-172):

"Now, Your Honor, I think I will interpose an objection upon that statement of counsel. The allegation in this indictment is that there were representations made that the defendants, the Cashier Company, had certain patents. It did have a patent, which it got from its predecessors, and there is a record of the company, which is called the Bilyeu patent. Now, in this case, I take it that this court has no jurisdiction to try out the question between Mr. Oviatt on the one side, and Mr. Bilyeu on the other, as to who is entitled to that patent. That has been determined by the department, and if there is an infringement or a conflict between Mr. Oviatt and this defendant, that is a matter to be settled by a court having jurisdiction to try it, and it doesn't seem to me that collaterally, in this case, the Government can attack a patent upon an allegation that

we didn't have it. If we have got it, and had it, it was a true representation; whether it is good, or conflicts with somebody else's patent, or Mr. Oviatt's, would depend, of course, upon the decision of the court in a suit brought for that purpose. For the purpose for which this evidence is offered, I make the objection. If it is admissible on any other grounds, of course the counsel could state it, but upon the ground of showing that Mr. Oviatt and not Mr. Bilyeu is entitled to the benefit of that patent, and that Mr. Oviatt and not this company, is entitled to the benefit of the patent, which the company has got, we think that would be submitting to the jury a question that they ought not to have to try, because it might very well be said that, upon the evidence adduced in this case collaterally, if counsel is right in his contention, the jury might find that Mr. Oviatt had the better right; I don't think they would, but they might, if it is competent for the evidence to be introduced; and yet upon a trial between them in a court having jurisdiction, it might be determined that Mr. Oviatt didn't have the better right; so you might have a decree in a criminal case, or a judgment in a criminal case, deciding against the defendant upon that issue collaterally; and it seems to me that ought not to be submitted to the jury, at least for that purpose."

Thereupon the district attorney replied: "Of course, Your Honor will remember that at the beginning of the Government's case, we introduced in evidence a contract entered into between the American Cash Record Company, on the one part, and the

United States Cashier Company, upon the other, by the terms of which certain patent rights alleged to be the property of the American Cash Record Company were sold to the United States Cashier Company. Now, one of the allegations in the indictment is that the stock in this company was worthless, and that these defendants knew it to be worthless. Now, anything that the Government could introduce that would tend to prove that this company, the United States Cashier Company, knew that what was being offered for sale had no value, would tend to sustain the allegation of the Government's complaint, that its stock was worthless. If the Government were able to prove that the United States Cashier Company was demonstrating machines, even for which they may have owned a nominal patent, when one of the defendants *knew of the great and grave danger that the company would experience whenever they proceeded to market or sell that machine*, why, it seems to me that would be one element of fraud, and would go to substantiate the charge in the indictment that the stock of the United States Cashier Company was not of the value that it was represented to be by the defendants."

Thereupon the counsel for defendants asked the following question of Mr. Reames: "May I ask a question, Mr. Reames? Is this particular patent the one that you do not negative in the indictment?" And Mr. Reames answered: "Yes, the one that is not negatived in the indictment."

Thereupon the counsel for the defense made another objection, in this language: "Then there is another question that occurred in the early part of this case. The allegation is that the defendants represented that they had patents on all of these machines, whereas, in truth and in fact, the indictment says they had patents only on one. That is to say, that particular patent is not negatived, and that being so, I take it that that is an admission, and not a matter in issue in this case, as to the existence and of course the validity of that patent. I take it that in an indictment, as in any other pleading, it is not sufficient to say that the representation is false, but it must be further shown by explicit allegation, in what respect it is false. Now, when it is said it was a false representation, in this indictment, that all these machines were patented, whereas in truth and in fact, the truth was that one of them was patented, or at least that there was no misrepresentation as to this particular machine, I take it that that is not in issue, but that it is to be taken as true in this case, not subject to be determined by the court or jury, but admitted by the indictment that this patent was truly represented, and therefore it cannot be a false representation, and no evidence can be introduced that has the slightest tendency to show that this patent was not a perfectly good patent, because it was the duty of the indictment, of the district attorney in drawing the indictment, if he meant to,

to tender to the defendants an issue upon that, to notify us by making a proper allegation.”

Whereupon the court ruled upon the objection in the following language: “I think in view of the indictment, that it must be conceded, for the purpose of this trial, if there was a patent, that the company had a patent to this particular machine. Further than that, I don’t suppose in this trial that the validity of the patent that has been issued by the Government can be tried or determined. There is evidence in this case tending to show that LeMonn made a visit East along in 1912, and learned of this particular instrument, and that it was being manufactured, and that he sent certain letters and certain telegrams to Mr. Menefee with reference to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose. I think this testimony of their connection with this patent is material in this case, *to show their good faith.*”

Thereupon counsel for the defendants said: “I am content with this limitation, that these two matters will be instructed to the jury that the patent is not in controversy.” And the court said: “In this case I understand it is admitted in the indictment.”

The evidence referred to in the court’s ruling is found on page 176, Transcript of Record, and is to the effect that the defendant LeMonn had made a visit East in the early part of 1912, and learned of



the manufacture of this particular instrument, and that he sent letters and telegrams to the defendant Menefee with reference to the matter, which letters and telegrams described said machine, stating that he, LeMonn, believed it to be a winner and advised the defendant Menefee to not sell any more of the capital stock of the company until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of; that subsequent to the receipt of the said telegram the defendants Menefee and Campbell, at Portland, Oregon, caused the board of directors of the United States Cashier Company to pass a resolution withdrawing all of the company's stock from the market and authorizing the defendants Menefee, LeMonn and Campbell to sell their own personal stock with the sales organization or sales force and the demonstration machines of the company, and that was the certain course of procedure referred to in the court's statement.

There was evidence tending to show that the information concerning the above instrument in the said letters and telegrams had no connection with the advice by LeMonn not to sell any more of the capital stock until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of, and that the resolution withdrawing the company's stock from the market was not on account of any information they had in respect to the said particular instrument.

The court allowed an exception, which is exception "A," page 177, Transcript of Record, to the admission of the said evidence upon the good faith of the defendants.

Two distinct questions arise on this ruling, as there were two objections. We will consider them separately. The first criticism is that the witness was allowed to testify that in 1909 he had an understanding with Bilyeu, the defendant who was discharged by the court, that he was to turn over his ideas to Bilyeu and Bilyeu was to proceed with the development and put it into working shape and build a model. The district attorney's statement of the purpose of this evidence shows that it was his object to show to the jury that these defendants knew of the great and grave danger that the company would experience whenever they proceeded to market and sell their own machine, to which they had a patent, because in 1909 Mr. Bilyeu, the inventor from whom the Cashier Company got the patent, had a controversy with Mr. Oviatt, and claimed, in effect, that he, Oviatt, was the inventor, and that Bilyeu had appropriated his invention and got the patent for himself. Under no theory can we conceive how this evidence was material. The representation relied upon, and which the Government was attempting to prove was false and fraudulent, was that the defendants' company owned a patent to the bank cashier. So far as the indictment discloses, it did have such a patent. The effect of the evidence relied on, according to

the district attorney's statement, was to show that the value of that patent, which the company owned and which was a part of its assets, was affected by the previous controversy and claim of Mr. Oviatt. It was to allow the jury to find from that evidence, not that the representation made as to the bank cashier was false or fraudulent, but that, being true, nevertheless the defendants would be guilty of bad faith and could be convicted upon this particular charge, notwithstanding the truth of the representation. And this bad faith, according to the ruling of the court and the argument of counsel, would arise from the fact that they sold stock in the corporation based upon a representation that turned out to be true, because for another reason not disclosed in the indictment, to-wit: the Oviatt controversy, the patentee would be subject to a law suit with Mr. Oviatt.

In considering this question we desire to have the court consider this particular representation as to the ownership of the patent to the bank cashier as if it were the only one described in the indictment. We do that for the reason, as will subsequently appear, that the court left the jury to find the defendants guilty upon finding that any one of the representations was false and fraudulent. In short, as the matter was presented to the jury, they might find for the defendants upon every other issue and yet find them guilty because the defendants knowingly procured a patent which was subject to Oviatt's successful attack. Upon this

point the contention that we make squarely is that the evidence did not relate remotely to the issues in the case, and had nothing to do with the alleged misrepresentation concerning this particular patent alleged in the indictment.

What was the issue with reference to the bank cashier patent? There was none. The representation charged was that the United States Cashier Company owned the patent to that machine. This representation is not negatived. It is therefore true. The department had decided that the patentee was entitled to the protection, rights and privileges granted by the patent law. It is *prima facie* valid even in a suit for infringement. In such a suit even Mr. Oviatt would have to overcome this presumption by allegations and proof showing a better right. But by the court's ruling the Government is permitted, without any allegations whatever and collaterally to prove that Mr. Oviatt "had devised the principles of a coin-paying machine," and that "he presented it to Mr. Bilyeu," and that Mr. Bilyeu "took it under consideration," and finally that they came to an "understanding that he (Bilyeu) would have forty per cent of the results and the witness the other sixty per cent of the results"; that the witness was "to turn over his ideas to Bilyeu" and Bilyeu was "to proceed with the development and put it into working shape and build a model"; that finally defendant Bilyeu took witness to Overlin to manufacture a model, and "the model was constructed," and then "a month or six



weeks after that time Mr. Bilyeu said to witness one day that he had been thinking the matter over for a week past and had decided that witness *did not own anything in the device*, and that he had applied for a patent *in his own name.*”

Now, what was all this evidence for if not to have the jury understand and find that Bilyeu had stolen Oviatt's ideas, and got a patent in his own name for Oviatt's ideas, with the necessary inference that the Cashier Company had a patent to the bank cashier to which Oviatt had a better right? And if there were any doubt of the object and the effect claimed for the evidence, it is made clear by the district attorney's statement, as follows: “If the Government were able to prove that the United States Cashier Company was demonstrating a machine, even for which they may have owned a nominal patent, when one of the defendants knew of the *great and grave danger* that the company would experience whenever they proceeded to market or sell that machine.” The defendants have had no notice by any allegation that the validity, value or protection of the bank cashier patent was to be attacked. There was no misrepresentation concerning this patent.

But the district attorney argued that the evidence was admissible in support of the allegation that the stock was worthless. “Now anything,” he said, “that the Government could introduce that would tend to prove that the company knew that what was being offered for sale had no value,



would tend to sustain the allegations of the Government's complaint that its stock was worthless." And the court seemed to take that view, and allowed the evidence upon that statement of its purpose. But that will not do. The allegations of the indictment as to the worthlessness of the stock are all based upon the falsity of the representations of the actual conditions of the company. The indictment did not content itself with alleging that the stock was worthless, but proceeded to show why it was worthless. The representation respecting the patents was (Indictment, page 13, Transcript of Record, bottom of page): The defendants "did represent, pretend and promise that the said corporation, etc., owned the patents to a certain change computing machine, a certain bank cashier machine, a certain lightning change maker, a certain currency paying machine, and a certain new-style adding machine, and that the said corporation, namely, United States Cashier Company, was engaged in the business of manufacturing and selling said machines, and each and every and all thereof. *That on account of said alleged ownership of said patents, etc.,* the said shares of stock of said corporation, namely, United States Cashier Company, were of great commercial value, and that large dividends would be by said corporation declared and paid thereon to the said investors, etc." That said company "would declare and pay to all of said investors, etc., large and certain dividends upon said stock within six months from the date when any of said

persons would purchase any of said shares of stock from the said defendants." And the negative (page 16, Transcript of Record), declared that neither the corporation nor the defendants owned the patents to four of the machines, omitting the bank cashier patent, and then proceeds to negative the business of manufacturing and selling the machines, and declared (page 17) that the shares of stock, "as the defendants well knew, were of very little value, and of practically no value whatsoever, and said shares of stock, and each and every and all thereof, were practically worthless." And as to the other allegations of misrepresentations, the same may be said. For instance, the representation that the company was "the owner of and in possession of large bona fide orders for the purchase of said machines, and that *on account of said orders*, etc., would make a large and certain profit" (page 14, Transcript of Record). And the same is true of the other misrepresentations. And there is no allegation in the indictment that the stock was worthless or was not worth what it was represented to be, on account of the fact that a patent which the company owned was injuriously affected in its value by a prior claim of Mr. Oviatt, or anybody else. This evidence introduces a new element of supposed fraud in dealing with this patent, not hinted at in the indictment. Now, the Oviatt claim could not be shown in any case, civil or criminal, against the *presumption* of the patent, without appropriate allegations. That patent is good in all

its extent against the world in the absence of allegations overcoming its prima facie effect; that is, a pleading is required to overcome the presumption of law in favor of the patent. If this is so in a direct proceeding against the patentee, by so much the more is it so in a collateral attack, and still more in a criminal case, where the presumption of innocence also must be overcome.

But the evidence admitted was incompetent for another reason. Concede, for the sake of argument, that it would be competent without allegations in this case to prove that Oviatt had a claim to the patent; it would still have to be a valid claim to affect the defendants. None of them, nor the company, were parties to the Oviatt-Bilyeu transaction. That was in August, 1909, more than a year before the conspiracy charged, and before the defendants' company bought the patent rights from Bilyeu. The defendants are sought to be affected by the Oviatt-Bilyeu transaction solely because afterwards, in selling the stock of the company, they knew of the Oviatt claim. They came into possession of this knowledge in 1912, through defendant LeMonn. The judge below, in ruling on the question, made this plain. After deciding that it must be conceded, for the purpose of this trial, if there was a patent, that the company had a patent to this particular machine, His Honor said: "There is evidence in this case tending to show that LeMonn made a visit East along in 1912 and *learned of this particular instrument*, and that it was being manufactured, and

that he sent certain letters and certain telegrams to Mr. Menefee with reference to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose I think this testimony of *their connection* with this patent is material to show their good faith." That is to say, whether they were in good faith. Now, bad faith cannot be imputed to defendants in dealing with their own patent because they found out that Oviatt had a prior claim of any kind, without showing that the claim was in fact paramount, valid and dominant. Notice of a prior or outstanding claim or right is good if it is enough to put on inquiry, but the outstanding right must be *established as a fact* before bad faith can be imputed by notice. A party who should be sued for damages for misrepresenting that property he sold was free from incumbrances could not be made liable without showing that the representation was false, that is to say, that the incumbrance actually existed. It would not be sufficient to show that somebody claimed to have an incumbrance. But the court permitted the jury to find an imputation of bad faith on the part of the defendants because they had notice of a claim of Mr. Oviatt, which might or might not be a good claim. Such cannot be the law. A patent is property, and the owner of it, as the owner of any other property, may deal with it without being guilty of fraud merely because somebody else claims to own it or to have a better right to it. The right to deal with



property and dispose of it is property. That property cannot be destroyed in his hands by showing that somebody else claims it.

This all goes to the necessity of showing the untruth of the representation. The argument of the Government and the ruling of the court rest upon the proposition that the representation that the stock was valuable is false, in that a patent which they owned was subject to Oviatt's claim. If the representation that the stock was valuable is to be taken as equivalent to a representation that the patent was valuable and afforded full protection, then the negative of that would be that the patent was not good and did not afford full protection, because Mr. Oviatt had a better claim to it. To negative, therefore, the proof of the representation that the bank cashier patent was fully protected and good and not affected by any prior right, it would be necessary to show that that representation was not true, not merely that it might prove so.

Mr. Pomeroy, in 2 Pomeroy, Sec. 882 (1st Ed.), says:

“Untruth of statement: The statement of fact must be untrue, or else there is no misrepresentation. The entire doctrine of the law of equity concerning that species of fraud which consists in *suggestio falsi* is based upon the assumption that the representation is in fact untrue, as this very name itself shows. This is the premise of a fact which is assumed in every case which discloses the nature of fraud, and decides whether it does or does not exist



in a particular instance. This requisite element needs, therefore, no examination and no citation of special authorities. It is not susceptible of any exception or limitation."

Now, it was not pretended or claimed that Oviatt's claim was in fact good, but only that it menaced "a great and grave danger." Were the defendants obliged to quit selling the company's stock because they discovered that one of their patents was claimed by somebody else under a transaction that originated before they bought it, upon peril of being convicted of bad faith, and of having their action construed as a scheme and artifice to defraud?

The scheme or artifice denounced by Section 215 must be set out in the indictment under that section, and in the conspiracy to commit the crime it must be alleged that the object of the conspiracy was to do the things necessary to constitute the crime. This must be shown at least with certainty as to a common intent. The scheme or artifice described in this indictment included a purpose to represent that the defendants owned patents which they did not own. It did not include a purpose or a conspiracy to represent that they owned a patent which was affected and lessened in value as an asset by an adverse claim. The evidence objected to, therefore, is not within the description of the scheme or artifice, or within the objects of the conspiracy. The indictment, therefore, does not only not inform defendants of the charge involved in

the Oviatt evidence, but it misleads them, for by charging the representation as to the bank cashier patent and failing to show that it was false, it invites them to be unwary of an attack in that quarter. Of course, if it be necessary to sufficiently describe the artifice or scheme, then the evidence must conform to the allegations, and evidence not in support of the allegations is necessarily aside from the issue.

The Payograph and Mr. Oviatt cut great figures in this case. His evidence was extensive and, if believed by the jury, would cause them to think that Mr. Oviatt had really been swindled by Mr. Bilyeu, and that the defendants were his accomplices and successors in the fraud. His machine was demonstrated before the jury, and a comparison invited with the machine of the defendants, which was demonstrated. The demonstration before the jury of Mr. Oviatt's machine, as the Bill of Exceptions shows, was without the consent of these defendants. The evidence interpolated into the issue between the Government and the defendants an issue between them and Mr. Oviatt, and the argument of counsel and the language of the court might well cause the jury to believe that they were trying the question of the defendants' bad faith towards Mr. Oviatt. Besides, the evidence tended greatly to divert the jury from the real issue. It was extremely prejudicial in the case, and we confidently contend that it was error to admit it.

Except for some reference to the law involved in the foregoing argument, to be hereinafter made, this disposes of the first three assignments of error. The second and third assignments are only a further development of Mr. Oviatt's testimony, and are subject to the same arguments made in reference to the first assignment, already quoted.

The assignments from IV to XVI, inclusive, may be considered together, as they present the repetition of the same error a number of times.

Mr. Sewell was an employe of the patent office, of long service and large experience in patent matters. He was eminently qualified as a witness on that subject. He examined the records of the patent office with reference to the patents and applications of the United States Cashier Company and its assignors, and of the International Money Machine Company. His examination extended from January 1, 1909, to December 31, 1914. His testimony begins on page 288, Transcript of Record. He testified that the United States Cashier Company did not own a patent to an adding machine, and did not have an application for an adding machine on October 29, 1911 (that being about the dates of the publications of ownership by the company); that it did not have an application on file at that date for the lightning change maker; that a patent for the lightning change maker, one of the machines mentioned in the indictment, was issued July 6, 1915, and the number of the patent was 1,145,700; that there was no application for the change computing

machine by the United States Cashier Company on October 29, 1911, and the United States Cashier Company did not own any patent for any machine designed to do that work; that the United States Cashier Company did not own any patents to any machine which was designed to compute change for department stores and all classes of retail business, as described in the indictment; that on the 29th of October, 1911, the United States Cashier Company had no application on file for any machine that would do that work, and that from the 1st of January, 1909, until the 31st of December, 1914, the United States Cashier Company never did own patents to any of the machines described in the advertisement about which he had been asked. The witness testified that a patent which was issued on the 6th day of July, 1915, was assigned to the International Money Machine Company, and witness presumed it was issued to them; that it had been assigned by the United States Cashier Company; that the patent was based on application made by Overlin; that except for the assignment it would have been issued to the Cashier Company, and the district attorney admitted that it was by virtue of the assignment of the United States Cashier Company that the International Company got the patent. (Page 289, Transcript.)

The witness then gave a list of the applications that had been filed, either on behalf of the United States Cashier Company or assigned to the United States Cashier Company, and all patents that had

been either issued to the United States Cashier Company, or issued to anyone else and assigned to the United States Cashier Company, from the year 1908 to December 31, 1914. The first patent was the Potter patent, issued April 28, 1908, and assigned by mesne assignments to the United States Cashier Company, recorded April 12, 1912. A certified copy of this patent is Exhibit "343."

The next patent was issued to Thomas Bilyeu, December 31, 1912, and was for a casing for coin-handling machines. The witness testified that there were other applications and other patents that were issued to others, like Thomas Bilyeu, and assigned direct to the International Money Machine Company; that there were eighteen applications and patents together that were either issued to Mr. Bilyeu or to Mr. Overlin and assigned, or other persons in the United States Cashier Company, and assigned to the International Money Machine Company; that of the eighteen applications there had been six patents issued and the other twelve applications were pending; that there were four where title never went through the United States Cashier Company, but assignment was made to the International Money Machine Company. One of these patents was dated October 20, 1914; another was issued February 28, 1911, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company; another was application by Thomas Bilyeu, filed April 14, 1910, assigned to the International Money Machine Company; another was application



filed March 27, 1911, by Bilyeu and Overlin, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company, and the latter had been allowed by the examiner, but not yet patented. Another was application filed September 24, 1909, which was forfeited, and was afterwards passed to issue and patented September 14, 1914, to Thomas Bilyeu. Certified copies of all these applications and patents were introduced by the Government.

At this stage the witness was asked the following question: "Now, you have said in your examination yesterday that when an application is filed in the patent office, and the examiner has made his search, and finds something in conflict, or apparently in conflict, that those claims are cited and notice given to the applicant that certain claims are cited against him. Now, can you give to the jury the number of the prior patents that were cited against this Bilyeu cashier?"

The witness answered: "Yes, I have a note of that. Fifteen patents cited during the prosecution of this application."

And the witness testified that one of the citations was a patent issued to a man by the name of Lindeloff, No. 619,321, dated February 14, 1899.

Whereupon the district attorney asked the witness the following question: "Are you able to say from that examination, as an expert in the science of patent law, whether or not the Lindeloff patent dominates the Bilyeu cashier?"

This question was objected to on these grounds: "We object to going into it to show whether or not some prior patent they did cite, upon which the department has issued a patent, if anything conflicts with that. If it were so, it wouldn't have anything to do with this case, and then the court and this jury can't try that out here, it seems to me. This is something that took place in the patent office. These defendants made their application."

Counsel for the defendants then asked the witness this question: "The department cites this previous machine, doesn't it?" And the witness answered "Yes."

After argument of counsel, the court ruled upon the objection as follows: "The controlling question in this case is one of good faith, and the government charges that these people were not engaged in a legitimate enterprise, but were using it for the purpose of defrauding the public. Now, then, if they had these patents, or pretended to have them, knowing at the time that they were not what they were representing them to be, and based upon that, insisted and represented that their stock was of a certain value, and was increasing in value all the time, and that they proposed to go ahead and manufacture these machines, it would come within the terms of this indictment, and would be a question that I think the jury have a right to consider, in determining whether they were acting in good faith in this transaction. If they were, then, of course, that is the end of the case. If not, and

they come within the provisions of the indictment, and sustained by the testimony, they would be guilty of the charge against them.

"Therefore, I think the Government has the right to show that, notwithstanding these people had patents, if they knew at the time that their patents were invalid, and would not permit them to manufacture these machines, it is a circumstance going to determine whether they were acting in good faith or not. It does not go to the validity of the patents. We are not trying that question. It goes to the good faith of the defendants, and for that reason I think the testimony is competent."

And the witness was permitted to answer the question, and this testimony is in Assignment V, page 293, Transcript. Under the said ruling of the court, the witness testified that the Lindeloff patent was issued February 14, 1899, which was cited against the Bilyeu patent, and the witness said he had read the claim of the Lindeloff patent in connection with the machine shown and described in the Bilyeu patent, No. 1,114,574, and in his judgment the construction shown and described was within Claims 1 and 2 of the Lindeloff patent.

The district attorney asked the following question: "What would you say as a patent expert as to whether or not the claims numbered 1 and 2 of the Lindeloff, as allowed, dominate and control these claims in the Bilyeu cashier?" And the witness answered: "These claims as allowed dominate the construction shown in the Bilyeu cashier."

And in like manner the witness testified about patent No. 885,136, patented February 28, 1911, to Thomas Bilyeu and W. S. Overlin, and assigned direct to the International Money Machine Company; that the purpose of this machine was the same as that of the patent to Bilyeu hereinbefore last recited; and the witness testified that the Lindeloff patent was cited against that application, and that as, an expert, in his judgment the claims of the Lindeloff patent dominated this patent in the same way that they did the patent previously spoken of, the original patent. (Page 293, Transcript.)

Thereupon the witness testified (page 294), in substance, that the witness referred to the patent in speaking about citing; that they generally made a positive rejection in view of that as meeting it, as anticipating the claims; they reject the claim to which that patent applies; that in the prosecution of an application through the patent office the solicitor and examiner give information back and forth until they finally get exactly what is thought to be patentable by the patent office; that the patent office delivers a written opinion to the applicant that he is not entitled to a patent because there has been another patent prior to that already issued, but that when they do not reject it, but issue a patent, they do not tell him that; they simply cite the art, cite the patent; that the department did not express any opinion regarding the infringement, and that the witness did not express

any opinion when that particular patent was issued, not as dominating, simply anticipating.

And thereupon, in view of the evidence, counsel for defendants moved to have the evidence stricken out.

And being further examined by the district attorney, the witness testified that a letter of rejection is written in which the patent is identified and the applicant is told that his claim is rejected, in view of that patent, in anticipation, but that when it was not rejected, if it was not to be rejected on that patent, that patent would not be cited except in a friendly way, perhaps, to show what the prior art was. And the witness then stated that he believed in his judgment claims 1 and 2 of the Lindeloff cover the construction disclosed by the Bilyeu Cashier; that that was witness' opinion after examination; that nobody in the patent office gave an opinion to Mr. Bilyeu about the dominating control referred to.

Whereupon counsel for the defendants said: "I think I am entitled to have that out, for it didn't go to Mr. Bilyeu."

The Court: "I understand they notified him of this prior patent."

Counsel for defendants: "They didn't notify him of the witness' opinion as an expert, because it was not their duty to give him that information."

The Court: "That is clear, but they did notify him of the patent, of the prior patent."



Counsel for defendants: "Yes, they cited the patent."

The Court: *"And advised him of that, so he knew there was such a patent, and he took his own chances with reference to disposition."*

Counsel for defendants: "I suppose for his information about that, but he didn't have the benefit of this witness' opinion that the jury had."

The Court: "No, goes to the question of his good faith."

And the court overruled the motion to strike out the testimony, which is Exception "E," page 203, Transcript of Record. And the witness testified that there were thirteen patents cited in the Bilyeu patent issued prior to that time, including the Lindeloff patent.

Then, in Assignment VI, which is Exception "F," page 211 of the Transcript, the witness testified about Application No. 555,552, filed April 14, 1910. by Bilyeu, Overlin and Gridley, and still pending; that the assignment was made to the International Money Machine Company; that it was an invention to cover another machine of the Bilyeu cashier type, and the witness said that there were ten patents cited against that.

In the same assignment of error witness testified concerning Application No. 638,434, filed by W. S. Overlin, assigned to the United States Cashier Company, and by mesne assignments to the International Money Machine Company. The filing was November 3, 1911. This was a machine for

delivering paper currency. The witness said there were nine patents cited against that. One was a patent that had been issued to a man by the name of Cook. The Cook patent was No. 807,724, dated December 19, 1905, and in the witness' judgment claim 63 of the Cook patent includes the drum structure disclosed in this application, and dominates it.

The rest of this assignment of error raises another question, different from the one we are now discussing, and we will postpone that and treat it separately.

In Assignment VII the witness testified, over the same objection and exception, which is Exception "G," page 216, Transcript, that there was an application, No. 702,164, filed by Nelson White, W. S. Overlin and F. A. Bullington. The invention was a mechanical cashier, adding and listing machine. The patent had not yet been granted. It was assigned to the United States Cashier Company, and afterwards to the International Money Machine Company by the Cashier Company. The machine comprised an adding machine, with printing attachment to print the amount separately and to take totals. The witness testified that there were twenty-four American patents and two German and two English patents cited by the examiner against that machine, and that that patent had been placed in interference by Nelson C. Oviatt on September 29, 1914. There had been 147 claims made in the application, and of these claims three were made counts in the issue of interference, and disregarded.

ing these, leaves 144, of which 20 have been allowed and 124 rejected.

The witness then testified about Application No. 710,512, filed by W. S. Overlin, for money paying, changing and listing machine, filed July 19, 1912. This machine was called the Computing Machine, and was the same machine that had been identified by the witness Overlin upon the stand as the computing machine which he had built. No patent had been granted. This had been assigned by Overlin to the United States Cashier Company and by the Cashier Company to the International Money Machine Company. After describing the machine, the witness testified that there were twenty-one United States patents cited against that machine and three English and two German patents. That there were two patents to a man named Osborne cited against that patent, Osborne patent No. 864,185, dated August 27, 1907, and Osborne patent No. 982,853, dated January 31, 1911. The witness said he had examined the Osborne patent carefully; that it had been issued to the National Cash Register Company, Dayton, Ohio, as the assignee from Osborne, the inventor. There were 115 claims in the Osborne patent.

Whereupon the district attorney asked the witness the following question: "Now, I wish you would make a comparison and show to the jury, I would like to have you do it carefully and in detail, whether or not this Osborne patent dominates and controls this change computing machine; and

if it does so, in what manner it does it, and what claims there are in the Osborne patent that do it."

And the witness then testified, in answer to said question, that he found several which, in his judgment, included the construction of the machine shown here as the Computing Machine. The witness noted Claim 18 of the Osborne patent, and read it, and he read Claim 47 and Claim 100 and Claim 101 of the Osborne patent, and then testified that the claims in the Osborne patent were fundamental and basic, and that, in the judgment of the witness, it would be extremely difficult for any one to evade that patent, that the only way he could escape it would be to invalidate it.

All of the foregoing testimony was taken and received over the objection of the defendants that it was incompetent on the question of good faith, or for any other purpose, to prove that the patents or applications involved could be affected by citation of a prior patent, and an exception was allowed, which is Exception "G."

Without making this statement too prolix, it may be stated generally that a patent, dated July 6, 1915, issued to the Cashier Company and assigned to the International Company, was affected by the first claim of the Lindeloff patent. This is Assignment VIII, Exception "H," page 218, Transcript of Record.

Assignment IX, Exception "I," page 219, Transcript of Record, concerned testimony about an application filed by one Bailey for a change-making

and computing machine, assigned to the United States Cashier Company, and that this was dominated by the Osborne patent.

Assignment X refers to a patent issued to one Pfeiffer, which the witness says was cited against the Bailey patent described in Assignment IX, and that eighteen claims in the Pfeiffer patent included the construction of the Bailey machine described in Assignment IX. This was Exception "J," page 220, Transcript of Record.

Assignment XI refers to an application for a currency paying and computing machine, issued November 5, 1912, and assigned to the United States Cashier Company, and by them to the International Money Machine Company. Witness testified there were twenty-one patents cited against that application, three of which were German. This was Exception "K," page 221, Transcript of Record.

The next assignment, No. XII, was an application by Thomas Bilyeu, filed January 18, 1913, being a paper money delivering machine. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. Witness said in his opinion this application contained rather broad claims that had already been allowed. This is Exception "L," page 222, Transcript of Record.

Assignment XIII concerns an application by Nelson White, filed March 20, 1913, for an adding and listing machine, assigned to the United States Cashier Company, and by it to the International



Money Machine Company. It was an improvement in an adding machine. There were twelve claims allowed on the application and fourteen objected to as not being clear enough. Against this application the witness testified there were ten patents cited, one English and one German, and the others United States, and that the patents cited were Burroughs and Pike. This is Exception "M," page 223, Transcript of Record.

Assignment XIV refers to an application filed by Thomas Bilyeu, May 13, 1913, for a paper currency paying machine. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. The witness said he considered the claims in that application broad. There were eight prior patents cited against that application during the consideration of that patent. This is Exception "N," page 223, Transcript of Record.

Assignment XV refers to an application filed by Nelson White, May 6, 1914, for ribbon feeding machine. This was assigned to the United States Cashier Company, and by that company to the International Money Machine Company. No patent had been granted on this application, and no amendment filed. There were ten claims in the application, of which three specific ones had been allowed and seven rejected, and there were seven prior patents cited against this application. This is Exception "O," page 224, Transcript of Record.

Assignment XVI concerned an application filed by Nelson White May 12, 1914, for a coin delivery machine. It was assigned to the United States Cashier Company, and by it to the International Money Machine Company. This was designed for the same purpose as the so-called lightning change maker. It was a complete reorganization and different organization. Witness testified there had been eleven prior patents cited by the patent office on this application. This was Exception "P," page 225, Transcript of Record.

It will be seen from the language of the court quoted above in ruling upon this evidence (page 292, Transcript of Record) that the evidence of the prior citations of patents in the patents and applications involved was admitted for the purpose of attacking the good faith of the defendants in making the applications and in procuring the patents. This language of the court explains that: "Therefore, I think the Government has the right to show that, notwithstanding these people had patents, if they knew at the time that their patents were invalid, and would not permit them to manufacture these machines, it is a circumstance going to determine whether they were acting in good faith or not." That is to say, that the jury might conclude from Mr. Sewell's testimony about the previous citations, both of named patentees and of others, that the defendants, in accepting the allowances made in their applications and the patents, were guilty of fraud. It is the law, and was sufficiently

well stated by Mr. Sewell in his testimony quoted, that when an application is made, the question before the department officers is whether it shall be allowed. If it conflicts with prior patents, it cites those patents to the applicant. If the department, however, concludes that the citation is not applicable and that the claim is allowable, it will be allowed. So that in every case where a claim had been allowed or a patent issued, the department necessarily decided that the claim allowed or the patent issued did not conflict with the patents cited against it. And yet the mere fact that in the process of getting these applications allowed and patents issued the department had referred to prior patents, is declared by the ruling of the court to be an evidence of bad faith, notwithstanding the decision of the department that the application is allowable and the patent good. This is so clearly error that it would be a waste of time to argue the question at length. In fact, this court has decided the question. We cite:

*Miller v. Eagle*, 151 U. S. 208; 14 S. C. R. 310, 319.

*Boyd v. Poole Co.*, 15 S. C. R. 837.

And particularly, *Ransom v. Hyatt*, 69 Fed. 148, an opinion of this court, Judge Gilbert speaking for the court, where the Supreme Court decisions upon the question were examined and reconciled.

And on the question that the expert opinion of the witness Sewell as to the conflict of the patents

with the patents and applications of the defendants is not competent evidence, we cite:

*Winans v. New York R. R. Co.*, 21 How. 98, 101.

*Corning v. Burden*, 15 How. 252; 20 U. S. 503, 508.

The reason for this is that the question of conflict is a question of law, to be determined by the court or jury having it under consideration, and is not the subject of expert opinion. The expert opinion may be given, in this as in other cases, to assist the court in reaching an opinion, but the opinion of the witness is incompetent. And yet Mr. Sewell, who was an influential witness and finely qualified, was allowed to go to the jury upon the question.

We turn now again to Assignment VI. The witness was proceeding to testify about Application 702,164, filed June 7, 1912, called the Bank Cashier. At this point it was admitted by the district attorney that the negative in the indictment as to the ownership of the patents by the company did not include the Bank Cashier, and that it had been left out of the indictment inadvertently. Thereupon the defendants objected to the evidence offered, which was to show that, notwithstanding the admission in the indictment, the defendants never had in fact obtained a patent for the Bank Cashier. The objection of the defendants was whether it was competent to prove this fact in the absence of a statement in the indictment that the representation concerning it was false. The coun-

sel for the defendants stated the objection as follows: "I will have the record show that the part of it I am sure about is that the indictment, in effect and legal substance, alleges by admitting that that machine was patented, and that no issue is raised between the indictment and the plea of not guilty on that question." The argument of the district attorney upon the question is found on page 209, Transcript, and without repeating it at length, it is sufficient to quote this much of the language: "Now, I desire to prove that this stock was of very little value, and practically worthless, and for the purpose of that I desire to prove just exactly what this corporation owned at the time that it was selling this stock. For that purpose alone, I believe I am entitled to prove just what they had." What the court understood is found in the language of the ruling found on pages 209 and 210 of the Transcript. The gist of the opinion is found in this language: "I think the Government is entitled, in a case of this kind, where it depends on circumstances, to put in evidence other acts of a similar kind, transactions of a similar kind that happened at the same time. And when they advertised these machines the Government alleges they didn't have, they advertised another machine they didn't have at the same time, and it is for the Government to show the purpose and intent for which they advertised the machine, and for that reason I think it is competent. But I don't think for the purpose of showing that was one of the means by which the



defendants intended to carry out that conspiracy. I think the Government is required in an indictment of this kind to negative those allegations, but it simply goes to the intent or purpose of the defendants."

But this was not putting in evidence other acts of a similar kind, transactions of a similar kind that happened at the same time. It was putting in evidence, evidence to show the falsity of a representation which the indictment admitted was true. If it would be proper to prove this representation false without a negative, it would be equally proper to prove every other representation mentioned in the indictment false without a negative, and the conclusion would have to be that it was not necessary to negative the truth of any of the representations in order to prove them false. Conceding that it might be proper to prove that a representation made by the defendants, not mentioned in the indictment but outside of the indictment, for the purpose of showing the intent of the defendants, yet that must be limited to other transactions than the transactions described in the indictment.

We rest in this simply upon the well-established rule of law that to charge the defendants with the consequences of a false representation, the pleading, whether in a civil or criminal case, must show that the representation is in fact false. The rule about other transactions to show intent is, prop-

erly administered, a wholesome rule, but it is not applicable here.

There remains the question whether or not the instructions of the court cured the error in the admission of the Oviatt testimony concerning the Payograph machine and the transaction with Bilyeu, and Sewell's testimony reciting the citation of prior patents against the patents and applications of the defendants, and corrected the impression conveyed to the jury by the court's rulings upon these questions made in their hearing. These rulings themselves had the effect of instructions to the jury as to the purpose of the testimony admitted. At the close of the case the defendants' counsel asked the court to give a series of instructions, which are found on pages 231 to 235, Transcript of Record. The court gave some of these instructions. They related to the questions of law that we are here discussing. The question we now present to the court is whether or not these instructions cured the errors complained of in respect of the Oviatt and Sewell testimony.

The only charges relating to the subject given by the court are contained in the following excerpt (page 247, Transcript of Record): "It is charged in the indictment that one of the means to be used by the alleged conspirators to carry out their fraudulent scheme was to represent that the United States Cashier Company owned patents to the certain coin machines heretofore mentioned, when in truth and in fact they did not own such patents.

If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they proposed to manufacture, and such representations were false, and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any willful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the patent office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. *Bad faith or fraudulent misrepresentation cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement.* There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent, and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention, and the

evidence of the witness Sewell to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation, false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity?"

Of course, this law is directly in conflict with the law held by the court in admitting the testimony and announced to the jury in the trial of the case on the rulings. This instruction constitutes an admission that the court was in error in admitting the evidence. But it will be seen, first, that the evidence is not withdrawn from the consideration of the jury in direct terms; second, that the rulings of the court in the admission of the testimony are nowhere referred to, and the jury are not told that the court had made a mistake in admitting it; third, the instruction did not tell the jury that that evidence was incompetent. The jury are not told that they could not decide, but only that they were not called upon to decide whether the patents issued or the claims allowed were an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention. On the other hand, the jury are told to disregard the evidence of Sewell to that effect. Mr. Sewell had testified that in his opinion those three patents, and some others not mentioned in

the instruction, dominated some of the patents and applications of the defendants. That was given as an expert opinion. The jury are told to disregard that opinion. But the evidence of the previous citations and of these dominating patents remained in the case. All of the patents and applications had citations made, which the court had admitted as affecting the validity of the patents and applications secured by the defendants. The error was repeated many times. Our contention is, under the authorities, that to cure the errors under the circumstances, if they could be cured; would require a more specific reference to the erroneous evidence and a more specific instruction to the jury to disregard, not only Mr. Sewell's expert opinion, but to correct the impression that must have been left with the jury by the court's previous opinion, expressed upon its competency and effect. As the matter stands, the court, in ruling on the evidence, as shown by the language of the court heretofore quoted, had given to the jury what it then conceived to be the law. These instructions give the jury a law exactly contrary. They are left to choose between the conflicting opinions of the court concerning the law.

These instructions say nothing at all about the Oviatt testimony, and yet the objection to that testimony is equally within the principle of his instruction. The patent admitted by the indictment to have been the property of the defendants, and for which the testimony, independent of the in-



dictment, shows they had an application allowed, was held by the court in admitting the testimony to be possibly injuriously affected by the Oviatt claim, so much so as to affect the defendants' good faith in dealing with that patent and that application. Under the instruction as given, of course, that evidence would have been incompetent, because it would have imputed, in the language of the court, "bad faith or fraudulent misrepresentations to the defendants in respect of a patent issued and owned by them, or in respect to a claim in fact allowed, because of some alleged infringement." As to the Oviatt testimony, the instruction is altogether general.

Under the rules of the Federal Court, and of the Supreme Court of Oregon, this instruction is not sufficient to cure the error, either in respect of the Sewell testimony or the Oviatt testimony. As to the Sewell testimony, we cite *State v. Aiken*, 41 Ore. 294. In that case, which was a charge of murder, the court had admitted the declaration of an alleged accomplice after the crime was committed. Bacon was the name of the accomplice. A witness testified that Bacon called at the place of business of the witness, William Woodard, and upon being asked to state what condition Bacon was in, the witness answered that he was muddy and had a lick over the right eye, and his clothes were torn on the shoulder. Upon objection, the Supreme Court held that this evidence was competent, but the district attorney then asked: "You

can give any statement Henry Bacon made." This was objected to, and upon being overruled, the witness continued to state what Bacon said: "His brother was sitting waiting for him, and he says, 'Where the devil have you been? Where did you get that mud? You must have had a scrap.' He said he had. His brother remarked he must have got the worst of it. Henry said, 'You ought to see the other fellow.' That was about all they said. They had a drink, and then left." The Supreme Court held, this being a declaration after the crime of an accomplice, it was not competent and error was committed in admitting it. The contention was made that the error was cured by the instruction of the court. The Supreme Court said:

"The court having erred in admitting the testimony complained of, the question to be considered is whether the error was cured by instructing the jury to the effect that, if they should find a conspiracy existed, any declarations made by Bacon or Malim in Aiken's absence after the homicide could not be accepted by them."

The court said, after stating the sharp conflict as to whether error could be cured by withdrawing it:

"Whatever the rule may be in other states, it is quite well settled that an error committed by inadvertently admitting improper testimony is cured by specifically withdrawing it (citing cases). In the case at bar, Woodard's testimony relating to Bacon's declaration, which

the jury must necessarily have understood as referring to the appearance of Shu, was not specifically withdrawn. The admission of incompetent prejudicial testimony influences the minds of jurors, and, in order to remove the impressions thus created, the direction of the court not to consider such testimony must be so specific that the jurors cannot possibly mistake the instruction (citing *Johnson v. State*, 17 Ala. 618). The court did not admonish the jury not to consider the declaration made by Bacon to his brother in Woodard's presence, but stated to them generally not to consider any declarations made by Bacon or Malim in Aiken's absence after the commission of the homicide. This, in our opinion, was not sufficient to call the attention of the jurors to the particular testimony sought to be excluded."

The Supreme Court of the United States lays down the rule in such cases, and the exceptions, in *Waldron v. Waldron*, 156 U. S. 361, 15 Sup. Ct. Rep. 383. This was a civil case, and error had been committed in allowing incompetent evidence, which was prejudicial. The question was whether the error was cured by the instruction of the court. The court said that in such case

"It is not only the right, but the duty of the court to correct an error arising from the erroneous admission of evidence, when the error is discovered, and when such correction is made it is equally clear that, as a general rule, the cause of reversal is thereby removed. There is an exception, however, to this gen-

eral rule, by virtue of which the curative effect of the correction in any particular instance depends upon whether or not, considering the whole case, and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction of the court."

In this case the court's withdrawal of the evidence was very much more explicit than in the case at bar. The court said that the evidence objected to was not evidence in the case and was excluded by the court, and instructed them not to draw any inference from it. The court held, however, that the instruction did not cure the error. It is true in this case that the counsel referred to this evidence in the closing argument, and that is given as one of the reasons for the ruling.

The court then cites the case of *Hopp v. Utah*, 120 U. S. 430, 7 Sup. Ct. Rep. 614, quoting therefrom the language of Mr. Justice Field:

"But, independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with its accompanying instruction, cured the error. It is true that in some instances there may be such a strong impression made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the original objection may be available on appeal or writ of error, but such instances are exceptional."

*Boyd v. United States*, 142 U. S. 450, 12 Sup. Ct. Rep. 292, was a trial for murder. In the court below evidence had been given by the prosecution of five robberies. The evidence of these robberies had been admitted for a specific purpose. In defining the purpose the court below named by name so as to identify two of the robberies, and referred to the other robberies as "these other crimes," and said:

"You are not to consider these other crimes as make-weight against the defendants alone. That is to say, you are not to convict the defendants because of the commission of these other crimes."

The Supreme Court held that the evidence was not proper and that this instruction of the court did not cure the error. It said:

"The charge made no reference to the robberies committed upon Brinson, Mode and Hall, except as they may have been in the mind of the court when he referred to 'these other crimes.'"

And the court said:

"The jury were left uninstructed in direct terms as to the use to which the proof of the Brinson, Mode and Hall robberies could be put in passing upon the guilt or innocence of the particular crime for which the defendants were indicted."

In this case also there was no exception to the instructions, but the court held that the exception to the testimony was not waived by the failure to except to the charge.



In the case of *People v. Wallace* (Cal.), 26 Pac. 650, the defendant was charged with murder. A witness for the state was asked: "After firing of the shots, did this man Moore say to you that Wallace had killed Rice?" This was ruled out, but the prosecuting attorney repeated the question, so that the court finally ruled that the witness might answer directly whether Moore did or did not make any remark at the time and place referred to, indicating that he heard the shots which killed Rice, but must not repeat the language used, to which the defendant duly excepted. The court held this was error, and the error was repeated. In its charge, the court said: "Some evidence has been admitted of the statement made by one Moore at the restaurant of Mr. Guthrie immediately after the shooting, but in this connection I say to you that the defendant at the bar is not bound by anything Moore may have said not in his presence and hearing." The Supreme Court held this did not cure the error, and did not withdraw the evidence. It said:

"It was not a plain and unequivocal direction to them to wholly disregard it as illegal and not proper to be considered at all, and therefore cannot be regarded as obviating the error in the previous ruling of the court."

The opinion in this case was written by Judge DeHaven.

In the case of *People v. Oldham* (Cal.), 44 Pac. 312, statements had been admitted of the declara-

tions of an alleged accomplice. The court, instructing the jury, said: "I charge you that no statements or admissions or confessions, other than his own sworn testimony in court, made by the alleged accomplice Hilton after the commission of the offense charged, and not in the presence of the defendant, should be considered by you as evidence in this case against this defendant, as tending to connect him with the offence." The Supreme Court said:

"Judges are not justified by the law in admitting evidence before the jury, under objection and exception, and then, after the case has been argued by counsel, instruct the jury that such evidence should not be considered by them in making up their verdict. Such a course, if practiced, certainly would be out of the ordinary and not fair to a defendant. This is a fair interpretation of the instruction."

In *Knickerbocker Trust Company v. Evans* (Circuit Court of Appeals, First Circuit), 188 Fed. 549, there was an action tried by a jury. It is sufficient to say that error was committed and repeated many times in the course of the trial, so that the court held that it must have impressed the jury. The court held that the general instruction that the evidence was incompetent, under the circumstances of that case, did not cure and could not cure the error. It said:

"Single instances or several instances of wrongful admission and a subsequent withdrawal of evidence are often treated as harmless, but here there are many instances. They

permeate the record, and while particular instances, standing alone, might be harmless, standing as a whole, as they did here, through the course of a long trial, they make such a mass of suggestion and evidence of intimacy between the plaintiff and its officers and Bennett, that the situation must be accepted as necessarily and naturally imbuing the minds of the jury with hostile impressions quite impossible to eradicate. The conclusion is irresistible that the mass of testimony shown by the record, which was wholly irrelevant, must have prejudiced the jury beyond the possibility of curing through a general withdrawal."

Applying the principle of these cases to the case at bar, the elements mentioned by the cases that make the error incurable are all present. In the first place, the particular evidence is not specifically referred to by the instructions. As to the Oviatt matter, it is not referred to at all. Second, the case comes within the Oldham ruling, because the supposed cure occurs only in a general instruction to the jury at the end of the case, and after argument of counsel. The defendants' counsel had no opportunity in the argument to take advantage of the later ruling of the court, but was obliged to meet the evidence at that time before the jury. And likewise the district attorney would be justified in arguing upon that evidence to the jury, and it must be presumed that he did so. And this is not a slight consideration. The court can see under what disadvantage the defendants' counsel would be to meet this erroneous and prejudicial evidence

upon the assumption, which he was obliged to make under the ruling of the court, that it was before the jury. Third, this case comes within the Waldron case and the Knickerbocker case in this: That the error was not an isolated one, but ran through the whole trial. The competency of the evidence was more than once asserted by the court, and the inference which might be drawn from it suggested, which was that the defendants might, from the evidence, be convicted of bad faith in the case. As we have already said, the Oviatt testimony was prejudicial, and it was emphasized, but it has never been taken away from the jury, unless a general charge would be sufficient announcing a different rule of law. In the Sewell testimony the error was repeated at length and emphasized in like manner. It would be impossible to say that the verdict was not based upon a consideration of these matters, notwithstanding the charge of the court.

It is proper to say that the defendants' counsel, believing that the court had been wrong in admitting the testimony, submitted the instructions which are referred to. If it shall be contended that it was his duty in submitting instructions on that subject to make them explicit enough to cure the error, the reply is that he was not bound to make a motion or to ask an instruction to withdraw the evidence, which, after full and complete argument, had been admitted over his objection. He did not commit the error and was under no obligation to have it withdrawn. However, it may be stated that

the instructions asked by the defendants' counsel were presented in good faith, to present what he conceived to be the correct rule of law in the case, and in order that the court might be assisted as much as possible with the instructions. As the court will see from the record, there were citations of the cases supporting his view.

But the instructions the court gave differed essentially from the instructions asked. In Instruction XI, page 234 of the Transcript, the requested instruction, after asking the court to instruct the jury to disregard the evidence of Mr. Sewell, which was given, proceeded: "And you are to find in accordance with the prima facie presumption that the said prior patents are not infringed by any of the patents obtained by the defendants and the Cashier Company." That last part of the instruction was not given, and it was a direct instruction that we were entitled to have, if we were right about the law. The court correctly stated, in accordance with the instruction, that there was such a presumption of law, but did not tell the jury they were bound to find in accordance with it. Likewise, Instruction III, page 232, Transcript, asked by counsel for defendants, asked the court to say to the jury as follows: "You cannot decide in this case that the patent of Osborne or Lindeloff or Cook dominated or affected injuriously any patent issued to the defendants, etc." The court, in giving that instruction, changed the language to say: "You are not called upon to decide in this case



whether the patents issued or the claims allowed were in fact an infringement, etc.” Perhaps the instruction that the court gave upon that might be ordinarily sufficient to indicate to the jury that such an issue was not in the case, but under the circumstances of the court’s previous rulings, the positive and direct instruction asked for would have been better. However, there were no exceptions to the court’s refusal to give the defendants’ instructions, and there were no exceptions to the instructions the court gave, and we are not referring to this matter for the purpose of predicated any error thereon. What we are doing is to show that the instructions given by the court, which it will be claimed have cured the error, were not even as explicit as those that counsel asked.

The next point we make arises upon Assignments XVII, XVIII and XIX, and they may be considered together. In our judgment these instructions were radically and fundamentally wrong and allowed the defendants to be convicted of conspiring to execute a scheme and artifice not within the terms of the indictment, and also took away from the jury the right to determine the good faith of defendants. We quote from Assignment XVII: “It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the

United States Cashier Company successful? The answer to these questions would necessarily be No." Before going further into these instructions, we pause to inquire what the court meant by this language. It is susceptible of two constructions. In its literal terms it was taking away from the jury the power to find the truth or falsity of the most important allegation in the indictment, and one which characterized in all of its extent and essence the artifice and scheme charged. That allegation is found on page 17, Transcript of Record, and is: "That in truth and in fact, and as the defendants well knew, the said corporation, namely, United States Cashier Company, was not engaged in either the business of manufacturing or selling said machines, or any thereof; but, on the contrary, its business was to sell and dispose of the said shares of stock." If the artifice and scheme was to sell stock and not manufacture or sell machines, then the defendants were charged certainly with an intent not to make the business of the United States Cashier Company a success, and with the knowledge that they could not make the enterprise successful, and did not intend to do so. The court did not merely express to the jury its opinion that the defendants had no intent to make the business a success, but told them in terms so positive what that intent was as in substance and effect to take away from them the decision of the question. The answer to the question the court propounded he said must necessarily be No, and the jury were not permitted

to answer that question Yes. Whether the court intended that or not by its literal language, the instruction was couched in such terms as indicate that the issue in the case of good or bad faith was eliminated from their consideration. And yet, under this indictment and under the authorities, the question of good or bad faith, that is to say, the question of an intent to defraud, is the fundamental and primary and essential question to be determined by the jury. This was an enterprise for manufacturing and selling certain machines, or it was not. The indictment said it was not, and because it was not an honest business and not intended to be a business for manufacturing and selling machines, that the stock was valueless, that is to say, it was bogus stock and a bogus business. Now, it would certainly be a defense to that allegation to show that the defendants were engaged in a business that they expected and believed they could make successful, and that they had such an intent, but the court, by this instruction, literally construed, has cut away that defense from under the feet of the defendants, and has told the jury that the defendants had no such intent and no such honest belief.

But the criticism of the language quoted would not be just, perhaps, if the question were only before the court as to its true construction. The question concerning that language is, how did the jury construe it? What construction would twelve ordinary men put upon that language, coming from

the lips of the judge in the progress of a long instruction? It is impossible not to suppose that the jury understood the instruction literally as it was given. But, frankly, we think the court did not mean that. To come to that conclusion has required some analysis of the whole instruction. It is only after such an analysis that the first impression from that instruction is removed. What the court probably was aiming to do was to tell the jury what intent was necessary to be proved by the Government under the indictment, and not what the actual intent of the defendants was.

But that construction does not make the instruction any better. That will appear from a consideration of the three instructions contained in these three assignments of error. And before going into that analysis we beg to make a brief analysis of the indictment to discover what scheme and artifice the defendants conspired to execute.

The indictment consists of two classes of declarations by the defendants. One class consists of representations of existing facts; the other of promises, assurances and opinions of value. The representations as to value were that the company owned certain patents, and they did not; that they had large orders for machines, while they had none; that their assets and liabilities were incorrectly stated; that they represented that the money to be derived from the stock was to be used for the benefit of the company, and it was not. The promises were that the stock would return big dividends;



that the value of the stock was such as to justify an increase in the selling price from time to time, and that the stock was worth what was asked for it. But all of the representations and all of the promises were means, so charged in the indictment, to carry out and effect a scheme and artifice, which scheme and artifice was to sell stock in a fictitious corporation, and not in a going, bona fide business. Assuming that misrepresentations as to the patents, as to the orders, as to the financial condition of the corporation, might constitute a scheme and artifice within the statute, without reference to the kind of corporation involved, yet the indictment in this case does not describe such an artifice. The difference between an artifice using false representations as to the value of stock in a going business, intended to be successful, and a scheme and artifice to sell stock in a purely fictitious concern, is not a difference in degree, but a difference in kind. We submit that if the business itself was a bona fide one to sell machines and to make a profit for the stockholders, that the defendants cannot be convicted because, in the conduct of that business, they misrepresented, even fraudulently, the financial condition of the stock, or the patent situation. If we are right in that, the instructions are erroneous.

The court said, Assignment XVII: "If they agreed to make false and fraudulent pretenses, representations or promises, if they agreed to make false and fraudulent representations and assur-



ances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money."

And in Assignment XVIII the court said that if they made the misrepresentations, "it matters not how confident they may have been that they would be able to make the business of the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under the circumstances, make them rightful by pointing to some ultimate good intent."

And Assignment XIX gives the same idea in different, but similar language.

The effect of these instructions is to have the jury understand that the defendants could be convicted of any one of the several misrepresentations of fact, if they found it to be fraudulent, although the representation was made for the purpose of inducing the investor to buy stock which was worth

what it was represented to be; that they would be guilty if their object was to make a profit for the investors. However, this question is not so clear as the next one which arises from these three assignments.

The court did not limit the instructions to representations and pretenses. It included promises and assurances. Now the indictment, as we have already shown, consists both of misrepresentations and promises. Therefore the effect of the first instruction is that if the defendants made a promise that they would get dividends and a profit on the stock they were buying, in the ultimate belief that their promise would be fulfilled and that they would make a success, they still could be found guilty. And in the instruction in Assignment XVIII, the court said if these defendants "agreed that they would put forth the false *promises* alleged, for the purpose of deceiving and misleading investors, etc., then it matters not how confident they may have been that they would be able to make the business or the corporation a success," that is to say, that they would be able to fulfill their promises, "or how confident they may have been that they would be able to return the money without loss, or with profit," and thereby fulfill their promise, nevertheless that would be getting the money of the investors wrongfully and fraudulently. And the error is further illustrated in Assignment XIX, where the court draws a parallel between embezzlement and this case. It says: "It

is a well-known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss, but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong." But the comparison is misleading. This case is not like embezzlement. A promise and assurance that the stock would return dividends and be profitable, in the honest belief that the promise and assurance would be fulfilled, is not a wrongful taking. It is not an intent to pay it back to cancel a wrong. It is not a wrong, however much the defendants might be mistaken. And this question is thoroughly settled by the Supreme Court of the United States, in the case of *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. Rep. 508. That was a case for using the mails to promote a scheme to defraud under Section 5480, which, for the purposes of this point, is applicable to Section 215 of the Criminal Code. It was contended in that case that under that section it would not be competent to prove any fraud except a misrepresentation of an existing fact, and could not be applied to the intention to carry out a contract in the future. But the court held that a scheme or artifice to defraud could consist of representations and promises as to the future, and held the indictment in that case good, because it alleged that the promises were made without any intention of fulfilling them. The matter was decided purely upon the indictment, no other part of the record

being before the court, and on page 511 of the Supreme Court Reporter the court said:

“If the testimony had shown that this Provident Company, and the defendant as its president, had entered in good faith upon that business, believing that out of the moneys received they could, by investment or otherwise, make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth the claim it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises.”

And the court, in the case at bar, has instructed the jury contrary to that, and has told them that they might convict for making a false promise and a false assurance, believing it to be true.

We are not favored with the contentions that will be made by the district attorney, except that we have reason to believe that the evidence on the part of the Government contained in the exhibits will be urged as sufficient to indicate to this court that the defendants are in fact guilty and that the case ought not to be reversed for that reason. If such a contention shall be made, since we will have no other opportunity otherwise to reply to that contention in a brief, we simply say now that the defendants are entitled to a jury trial, with correct instructions as to the law governing them, and if



error was committed it must be presumed to have been prejudicial; that we are not trying the question of the guilt or innocence of the defendants in this court, but only the question whether they have had a fair and legal trial. That is the only question for the court in any case, and particularly in this case, where the evidence on behalf of the defendants is not made a part of the Bill of Exceptions.

The presumption of innocence in favor of the defendants is equivalent to evidence, and in considering the errors assigned in this case the court must apply that presumption and assume that, even unsupported by evidence, it might be sufficient to overcome the evidence referred to in the Bill of Exceptions, offered by the Government. That the presumption of innocence is equivalent to evidence is decided by the Supreme Court of the United States in the case of *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. Rep. 394, where the court reversed a criminal case because the court did not give a requested instruction to the effect that the defendants were presumed to be innocent, although the court below had given an instruction that the jury must find the defendants guilty, if at all, beyond a reasonable doubt.

Before leaving this case we will refer to a claim made in the indictment, and which perhaps will be made in the argument, that there was omitted from the statement of liabilities of the corporation the sum of more than half a million dollars. Of course



such a discrepancy as that, if true, would be a very serious discrepancy. But this result is arrived at from the fact that the statements did not contain the stock liabilities of the corporation. We will give these figures, which will be, we are sure, agreed to as correct by the learned district attorney.

The results of the books, taken by the expert on January 31, 1911, show:

Total assets .....	\$494,106.21
Total liabilities .....	198,447.13

But to these liabilities are added:

Capital stock issued.....	\$289,181.35
Stock subscribed, but not issued.....	71,068.30
	<hr/>
	\$360,249.65

This sum was added to the liabilities so as to make the statement of liabilities read \$558,696.78, and the excess of liabilities over assets, by that method of computation, would be \$64,590.57. If the stock liability is not included in the liabilities as a proper item, the excess of assets over liabilities on that date would be \$295,659.08.

This is a contention to make a matter of book-keeping a matter of fraud. In short, it is argued that though a corporation should state truly its actual assets and its actual debts, that its officers would be guilty of fraud because in that statement it was not also stated what would be owing to the stockholders upon a distribution. Such a contention is not tenable. Suppose that subscriptions to

the amount of \$100,000 were paid into the treasury, and there were no debts, the assets would be \$100,000 in cash, and the liabilities would be \$100,000 to the stockholders, and, according to the argument, the corporation would be insolvent.

A statement was made October 31, 1911. The true difference between the actual assets and the actual liabilities on that date, as shown by the books, was the difference between

Actual assets .....	\$837,576.33
Actual liabilities .....	159,428.70
	<hr/>
	\$678,147.63

But these liabilities were increased by the expert to more than \$1,000,000 by adding to them stock liability to the amount of \$851,660.15.

On January 31, 1912, the books show:

Actual assets .....	\$903,334.66
Actual liabilities .....	83,341.00
	<hr/>
Making excess of actual assets over actual liabilities .....	\$819,993.66

But to the liabilities there was added by the expert \$1,023,328.65, and by swelling the liabilities in that manner it was made to appear that the excess of liabilities over assets was \$203,334.99.

On May 31, 1912, the books showed:

Actual assets .....	\$891,971.56
Actual liabilities .....	83,128.02
	<hr/>
Making excess of actual assets over actual liabilities .....	\$808,843.54

But to these liabilities there was added by the expert \$1,168,072.81, so that the statement was made to appear that the excess of liabilities over assets was \$359,229.27.

On April 30, 1913, the books showed:

Actual assets .....	\$805,665.24
Actual liabilities .....	84,005.20

---

Making excess of actual assets over

actual liabilities .....\$721,660.04

But to these liabilities there was added by the expert \$1,197,754.48, making it appear that the excess of liabilities over the assets was \$476,094.44.

On January 31, 1914:

Actual assets .....	\$772,717.75
Actual liabilities .....	98,703.85

---

Making excess of actual assets over

actual liabilities .....\$674,013.90

But to these liabilities were added by the expert \$1,196,232.82, making it appear that the excess of liabilities over assets was \$522,218.92.

We submit that such a computation is not allowable to sustain an allegation of a fraudulent misstatement of assets and liabilities. There is no error predicated upon this evidence. We refer to it only for the purpose of removing from the mind of the court an impression against the defendants, which would be justified if the matter were left unexplained. There was evidence of discrepancies, however, in the statement of the liabilities in two

or perhaps three instances. The exact amount we have not at hand, but are content that the district attorney shall state the sum to the court if he chooses, with our confident assertion that, when stated, the court will see that the discrepancies are not of such magnitude or moment that they would not ordinarily be explained rather by attributing them to oversight or carelessness than to an intent to mislead the public as to the financial condition of the corporation.

Respectfully submitted,

MARTIN L. PIPES,

J. J. FITZGERALD,

JOHN F. LOGAN,

Attorneys for Plaintiffs in Error.

